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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 321

THE CREEK NATION, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 21, 1942.

CERTIORARI GRANTED OCTOBER 19, 1942.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. F-369

THE CREEK NATION,

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

The original petition was filed November 29, 1926.

On January 28, 1927, a general traverse was filed by defendant.

On May 29, 1930, on motion made therefor and allowed by the court, the plaintiff filed an amended petition.

On July 8, 1930, a general traverse was filed by defendant to plaintiff's amended petition.

On October 8, 1931, on motion made therefor and allowed by the court, the defendant filed a demurrer to the amended petition.

On December 8, 1931, the case was argued and submitted on demurrer.

On May 2, 1932, the court filed an order overruling [fol. 2] defendant's demurrer to plaintiff's amended petition without prejudice.

On May 5, 1932, a general traverse was filed by defendant to plaintiff's amended petition.

On June 4, 1932, the defendant filed a motion to require the plaintiff to make amended petition more definite and certain.

On June 16, 1932, the defendant filed a motion for rehearing on its demurrer to the amended petition.

On August 27, 1932, the defendant's motion to make amended petition more definite and certain was ordered to the Law Calendar for oral argument.

On October 10, 1932, the case was argued and submitted on defendant's motion to make amended petition more definite and certain.

On November 14, 1932, the court filed an Order allowing defendant's motion for a new trial, sustaining defendant's demurrer to amended petition and dismissing said amended petition.

[fol. 3] On November 25, 1932, plaintiff filed a motion to reinstate case and to permit same to be argued on demurrer, and said motion was allowed by the court on December 8, 1932.

On February 14, 1933, on motion made therefor and allowed by the court, the plaintiff filed its second amended petition which is as follows:

II. Second Amended Petition—Filed February 14, 1933

(Original Petition filed November 29th, 1926)

(Amended Petition filed April 16th, 1930)

To the Honorable the Court of Claims:

The plaintiff, the Creek Nation, respectfully represents: That for its first cause of action the plaintiff states:

I

That by a certain Act of Congress, approved May 24th, 1924 (43 Stat. 139, as modified by Joint Resolution ap-[fol. 4] proved May 19, 1926, 44 Stat. 568, giving permission to file separate petitions, and Joint Resolution of February 19, 1929, 45 Stat. 1229, extending the time for filing suits until June 30, 1930), plaintiff was authorized and empowered to bring this action.

II

That at all times mentioned herein, and for many years prior thereto, the Creek Nation was the owner in fee of certain lands now within the boundaries of the State of Oklahoma, which said lands constituted its National Domain. That thereafter, and by a treaty made on the 14th day of June, 1866 (14 Stat. 785), between the United States and said Creek Nation, the said Creek Nation ceded to the United States the west half of its said National Domain, reserving the east half of same which, by said treaty, was solemnly guaranteed by the United States to said Creek Nation.

III

That Article V of said Treaty of 1866 granted a right-of-way from east to west and from north to south through

the diminished Creek National Domain. Said Article V provides in part as follows:

"The Creek Nation hereby grants a right-of-way through their lands, to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approba-
[fol. 5] tion of the Secretary of the Interior, undertake to construct a railroad from any point north to any point in or south of the Creek country, and likewise from any point on their eastern to their western or southern boundary."

That thereunder it became the duty of defendant to supervise the grants of said rights-of-way to two railroad companies duly authorized by Congress to construct roads through the Creek National Domain, to execute properly the provisions of said Article V; and to protect plaintiff in the quiet possession of the lands of its National Domain not so granted, as provided by Article I of said Treaty of 1866.

IV

That under said Article V the Missouri, Kansas and Texas Railway Company was authorized to construct a line of railroad from the north line of the Creek National Domain to the south line thereof. That in constructing said line of railroad it appropriated as a right-of-way therefor, a strip of land 200 feet wide, extending from the said north line of the Creek National Domain to the south line thereof, a distance of 72.5 miles.

V

That under said Article V the Atlantic and Pacific Railroad Company was authorized to construct a line of railroad from the east line of the Creek National Domain to the west line thereof.

[fol. 6] That all rights of said Atlantic and Pacific Railroad Company were assigned to the St. Louis and San Francisco Railroad, and that said last named company constructed said line of railroad. That in constructing said line of railroad, it appropriated as a right-of-way therefor, a strip of land 200 feet wide, extending from said east line of the Creek National Domain to the west line thereof, a distance of 51.25 miles.

VI

That defendant, in violation of its duties under said Article V and of the rights of the plaintiff to lands of its National Domain so guaranteed under said Treaty of 1866, permitted each of said railway companies to stake out what are known as "station reservations" along their said 200 feet of rights-of-way. That said reservations consist of an additional strip of land on each side of said rights-of-way, each of said reservations containing approximately 20 acres, which were unauthorized and unlawful intrusions upon the lands of the Creek National Domain.

VII

That said additional lands so staked out as above described were not necessary to the rights-of-way of said railroad companies or to the operation of their said railroads; that said lands were not granted or ceded by said Creek Nation under said Article V of said Treaty of [fol. 7] 1866; and that the staking out of each of said "station reservations," above described, was an unauthorized intrusion by said railroad companies upon the lands of said Creek Nation, permitted by defendant.

VIII

That said railroad companies have never used, and are not now using said lands for the purposes of operating their said railroads, but due to defendant's neglect of duty as aforesaid, have rented and are now renting the same for meadows, farm land, and, where said "station reservations" are in cities and towns, have leased the same for business purposes unconnected with the operation of said railroad companies, and have caused to be erected thereon, stores, warehouses, lumber yards, and other mercantile houses entirely unconnected with the operation of said railway companies, renting the same to tenants and deriving a profit therefrom.

IX

That after a thorough investigation and diligent search plaintiff is unable to find records in the Department of the Interior accurately describing the number of the several "station reservations" and is informed and believes

and therefore avers that the only record accurately describing the number and location of each of said reserva-
[fol. 8] tions was a certain book formerly in the Office of the Superintendent of the Five Civilized Tribes at Muskogee, Oklahoma, which said book, plaintiff is informed and believes and therefore avers, is lost and destroyed. But that the location and number of said reservations are well known to certain officers and agents of defendant and that said reservations are well defined by marks and boundaries along said rights-of-way, and can be readily located upon the taking of proof in this case.

X

That said intrusions by said railroad companies upon the said Creek National Domain, so permitted by defendant, were violations of the rights of plaintiff under Article V of said Treaty of 1866; that by defendant's failure to execute properly its duties thereunder the plaintiff has been deprived of the quiet possession and enjoyment of said lands provided for in Article I of said Treaty of 1866; and that defendant, well knowing the facts as above set forth, has failed, neglected and refused to put plaintiff in possession of same, and therefore is liable for the damage resulting to plaintiff from defendant's failure to perform properly its obligations under said Treaty of 1866.

[fol. 9] PLAINTIFF'S SECOND CAUSE OF ACTION

That for its second cause of action plaintiff states:

I

That plaintiff restates and repleads Paragraphs I and II of its first cause of action.

II

That under the general provisions of the Act of Congress, approved February 28, 1902 (32 Stat. 43), other railroad companies desiring to construct lines through the Creek National Domain were authorized to appropriate rights-of-way under the conditions prescribed therein. Thereunder it became the duty of defendant to supervise the grants of said rights-of-way to said railroad companies constructing lines of road through the Creek National

Domain, and to execute properly the provisions of said act.

III

That in addition to the railroads provided for in plaintiff's first cause of action, certain other railroad companies acquired rights-of-way of 200 feet in width through the Creek National Domain, under the terms of said Act of February 28, 1902, which said roads are particularly described as follows, to-wit:

[fol. 10] A certain railroad, now a branch line of the St. Louis and San Francisco Railroad Company, extending from Sapulpa, Oklahoma, in and through said Creek Nation to the southwestern boundary thereof; a certain railroad now a branch of the Missouri, Kansas and Texas Railroad Company, extending from Tulsa to the eastern boundary of the Creek Nation; a certain railroad known as the Midland Valley Railroad Company, extending from Tulsa to the eastern boundary of the Creek Nation; a certain railroad now a branch of the St. Louis and San Francisco Railroad Company, extending from Okmulgee to the eastern boundary of the Creek Nation; a certain railroad now known as the Kansas, Oklahoma and Gulf Railroad Company, extending from the eastern boundary of the Creek Nation to the southern boundary thereof; a certain railroad known as the Ft. Smith and Western Railroad Company, extending from the southeastern portion of the Creek Nation to the western boundary thereof; a certain railroad now known as the Chicago, Rock Island and Pacific Railroad Company, extending from the southern boundary of the Creek Nation to the eastern boundary thereof; a certain railroad now known as the St. Louis Iron Mountain and Southern Railroad Company, extending from the northeastern boundary of the Creek Nation to the eastern boundary thereof.

[fol. 11] IV

That defendant, in disregard of the provisions of said Act of February 28th, 1902, and of the rights of the plaintiff, and in violation of its covenant to guarantee to the plaintiff the quiet possession of its National Domain under the provisions of the Treaty of June 14, 1866, permitted each of said railroad companies to stake out what are

known as "station reservations" along said 200 feet of rights-of-way. That said reservations consist of an additional strip of land on each side of said rights-of-way, each of said reservations containing approximately, 20 acres, which were unauthorized and unlawful intrusions upon the lands of the Creek National Domain.

V

That said additional lands so intruded upon as above described, were not necessary to the rights-of-way of said railroad companies or to the operation of their said railroads; that said lands were not granted under said Act of February 28th, 1902; and that the staking out of each of said "station reservations" above described, was an unauthiorized intrusion by said railroad companies upon the lands of said Creek Nation, permitted by defendant.

VI

That plaintiff restates and repleads Paragraphs VIII and IX of its first cause of action.

[fol. 12]

VII

That said intrusions by said railroad companies upon the said Creek National Domain, so permitted by the defendant, were violations of the rights of the plaintiff under the said Act of February 28th, 1902; that by defendant's failure to execute properly its duties thereunder, the plaintiff has been deprived of the quiet possession and enjoyment of said lands provided for in Article I of said Treaty of June 14th, 1866; and that defendant, well knowing the facts as above set forth, has failed, neglected and refused to put plaintiff in possession of same, and therefore is liable for the damage resulting to plaintiff from defendant's failure to perform properly its obligations under said Act of February 28th, 1902, and said Treaty of 1866.

PLAINTIFF'S THIRD CAUSE OF ACTION

For its third cause of action, plaintiff states:

I

That plaintiff restates and repleads Paragraphs I and II of its first cause of action, and Paragraphs II and III of its second cause of action.

II

That Section 15 of the Act of February 28th, 1902 (32 Stat. 43), provides in part, as follows:

"Section 15. That before any railroad shall be constructed or any lands taken or condemned for any of the [fol. 13] purposes set forth in the preceding section, full compensation for such right of way and all land taken and all damage done or to be done by the construction of the railroad, or the taking of any lands for railroad purposes, shall be made to the individual owner, occupant, or allottee of such lands; and to the tribe or nation through or in which the same is situated;"

III

That plaintiff is informed and believes and therefore avers that no such compensation for said lands of the Creek National Domain, appropriated under the provisions of said Section 15, was ever paid by said railroad companies.

IV

That Section 16 of said Act of February 28th, 1902, provides in part as follows:

"Sec. 16. That where a railroad is constructed under the provisions of this Act there shall be paid by the railway company to the Secretary of the Interior, for the benefit of the particular tribe or nation through whose lands any such railroad may be constructed, an annual charge of fifteen dollars per mile for each mile of road constructed, the same to be paid so long as said lands shall be owned and occupied by such nation or tribe, which payment shall be in addition to the compensation otherwise provided herein."

V

That plaintiff is informed and believes and therefore avers that said annual charge of fifteen dollars per mile [fol. 14] for each mile of road constructed has never been so paid in full to date by said railroad companies to the Secretary of the Interior, for the benefit of said Creek Nation.

VI

That the Creek Nation has owned and occupied and now so owns and occupies the lands constituting said

rights-of-way; that plaintiff is informed and believes and therefore avers that defendant, in violation of its obligations under said Act of February 28, 1902, and under said Sections 15 and 16 thereof, has failed, neglected and refused to collect the compensation provided therein for the benefit of the plaintiff; that defendant has never accounted to the plaintiff in full to date for said compensation, thus depriving plaintiff of the benefits provided therein; and therefore defendant is liable to plaintiff for defendant's failure to perform properly its said obligations.

PLAINTIFF'S FOURTH CAUSE OF ACTION

That for its fourth cause of action, the plaintiff states:

I

That plaintiff restates and repleads Paragraphs I to IX of its first cause of action and Paragraphs II to VI of its second cause of action.

II

That Section 11 of the Act approved April 26, 1906 (34 Stat. 137), states in part, as follows:

[fol. 15] "Sec. 11. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes, * * * shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him;"

III

That under said Section 11, it became the duty of defendant to collect the rents and profits derived from plaintiff's lands, but that in violation of its duties the defendant permitted said railroad companies to rent plaintiff's lands unlawfully intruded upon, and to collect said rents and profits and to convert same to their own uses, thus depriving plaintiff of the benefits thereof; and for said failure, neglect and refusal of defendant to perform its said duties, defendant became liable to plaintiff for the amounts of said rents and profits, and that defendant has never accounted to plaintiff for the amounts of same.

Plaintiff's Fifth Cause of Action

That for its fifth cause of action the plaintiff states:

I

That plaintiff restates and repleads Paragraph I of its first cause of action.

[fol. 16]

II

That plaintiff restates and repleads all of the unlawful and unauthorized acts of said railroad companies and the wrongs perpetrated by same upon the plaintiff, known to and unlawfully permitted by the defendant, and all facts relative thereto, as set forth in plaintiff's first, second, third and fourth causes of action.

III

That Section 18 of the Act of Congress approved April 26, 1906 (34 Stat. 137), provides in part as follows:

"Sec. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the * * * Creek * * * tribe * * * for the collection of any moneys or recovery of any land claimed by * * * said tribe * * * and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits."

IV

That, although said facts as herein set forth were well known to defendant for many years, yet in violation of its express duties under said Section 18 of said Act of April 26, 1906, it has failed, neglected and refused to bring suits [fol. 17] for the collection of the moneys due from said railroad companies, or for the recovery of the lands wrongfully intruded upon and claimed herein by the Creek Nation, although often requested by plaintiff so to do; that by defendant's failure, neglect and refusal to perform its said duties under said Section 18, it became liable to the plaintiff for the compensation and the value of said lands of which the plaintiff has been so unlawfully deprived.

V

That at all times mentioned herein the plaintiff has had no redress, or now has the means or the right to recover in its own name said lands thus intruded upon, or to so collect the said compensation to be paid for the benefit of plaintiff as herein set forth, except through the action of the United States.

Wherefore, the premises considered plaintiff prays:

1. That under plaintiff's first and second causes of action defendant be required to account for the lands of said "station reservations" so unlawfully intruded upon, and that judgment be entered against the defendant for the full present value of same.

2. That under plaintiff's third cause of action defendant be required to account for the collection of said compen- [fol. 18] sation for the benefit of plaintiff as therein set forth, and that judgment be entered against defendant for the amounts found to be due plaintiff which were not so collected by defendant.

3. That under plaintiff's fourth cause of action defendant be required to account for the rents so collected by said railroad companies which defendant unlawfully permitted to be misappropriated and diverted from the funds of plaintiff, and that judgment be entered against the defendant for its failure to so collect the amounts of said rents and profits.

4. That under plaintiff's fifth cause of action defendant be required to account for the lands and moneys of which plaintiff has been so unlawfully deprived because of the failure, neglect and refusal of defendant to file and prosecute suits to recover same for the benefit of the plaintiff, and that judgment be entered against defendant for the full present value of said lands, and for the amounts of money so found to be due plaintiff.

5. That on all of said items due plaintiff interest be allowed at the rate of six per cent from the dates of said unlawful acts so complained of herein.

The Creek Nation, by E. J. Van Court, Its Attorney of Record.

Of Counsel: Paul M. Niebell.

[fol. 19] *Duly sworn to by E. J. Van Court. Jurat omitted in printing.*

[fol. 20] III. Demurrer to Second Amended Petition—Filed January 29, 1942, by leave of court

Now comes the defendant and demurs to each of the alleged causes of action in the second amended petition separately, upon the grounds that (1) the allegations of neither of the alleged causes of action state facts sufficient to constitute a cause of action against the defendant, and (2) the Court has no jurisdiction over the subject matter of either of the alleged causes of action, because no facts are alleged in either thereof which state a claim arising out of any treaty, agreement or Act of Congress.

Defendant demurs to each of the alleged causes of action numbered four and five upon the additional ground that the claims attempted to be alleged therein are first stated in the second amended petition which was not filed within the time specified in the Jurisdictional Act of May 24, 1924, 43 Stat. 139, as extended by the Joint Resolution of February 19, 1929, 45 Stat. 1229.

Respectfully submitted, Norman M. Littell, Assistant Attorney General. Raymond T. Nagle, Charles H. Small, Attorneys.

[fols. 21-22] IV. Argument and Submission of Case

On March 2, 1942, the case was argued and submitted on defendant's demurrer by Mr. Charles H. Small for defendant, and by Mr. Paul M. Niebell for plaintiff.

[fol. 23] V. **Opinion of the Court by Green, J.**—Filed June 1, 1942

Mr. Paul M. Niebell for the plaintiff. Mr. C. Maurice Weidemeyer was on the brief.

Mr. Charles H. Small, with whom was Mr. Assistant Attorney General Norman M. Littell, for the defendant. Mr. Raymond T. Nagle was on the brief.

On Demurrer to Second Amended Petition

GREEN, Judge, delivered the opinion of the court:

The suit is based upon the action of certain railway companies in taking over a right-of-way through the Creek country under the Treaty of 1866, 14 Stat. 785, and the Act of February 28, 1902, 32 Stat. 43, and particularly in the appropriation of certain areas along the right-of-way for station reservations and the failure of the defendant to collect and pay to plaintiff the sums alleged to be due the plaintiff by reason of such wrongful action. Plaintiff's first amended petition alleged that these appropriations were not authorized by the Treaty or statute, that the land was not necessary for railroad purposes and was not used therefor but was rented by the railroads to third persons. Plaintiff also alleged that no compensation was paid for the land so taken and that annual charges prescribed by the Act of 1902 were not paid. Plaintiff further alleged that by the terms of the Treaty and the Act of 1902, the United States guaranteed against intrusion by the railroads and assumed the duty of collecting from the railroads the compensation and annual charges due and recovering money damages. Relief by way of money damages was demanded.

[fol. 24] Defendant demurred to plaintiff's first amended petition, on the ground, among others, that the court was without jurisdiction over the subject matter and set out no cause of action. This demurrer, at first, was overruled but afterwards a similar demurrer of the *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494, was sustained. The causes of action being essentially similar, the court withdrew its earlier decision in case at bar and sustained defendant's demurrer upon the authority of the *Choctaw and Chickasaw case, supra.* More than eight and one-half years after the approval of the Jurisdictional Act (May 24, 1924) 43 Stat. 139, plaintiff filed its second amended petition to which the defendant again demurs. It is contended on behalf of the defendant that no new cause of action is set up in the second amended petition or any cause of action whatever, and that following the decision in the *Choctaw and Chickasaw case,* the demurrer should be sustained.

In the second amended petition the plaintiff sets up five causes of action which may be summarized as follows:

In the first it alleges that by Article I of the Treaty of June 14, 1866, *supra,* the United States guaranteed to

the Creek Nation quiet possession of its national domain reserved under the treaty; that by Article V the plaintiff granted a right of way through its domain for the construction of a railroad; and that under this treaty it became the duty of defendant to supervise the right of way and protect plaintiff in the quiet possession of its lands not so granted. That defendant authorized two railroad companies to construct roads through the Creek domain and to take rights of way 200 feet in width; that defendant permitted these railroad companies to stake out certain "station reservations" along the rights of way which were not granted by the Treaty of June 14, 1866, which were not necessary to the operation of the railroads and were never used for railroad purposes; that such action was an unauthorized intrusion upon the lands of plaintiff permitted by defendant; that defendant knowing the facts has failed and refused to enforce the treaty and put plaintiff in possession of its lands, and therefore is liable to plaintiff for the value of the "station reservations" because of the violation of the treaty.

[fol. 25] The second count alleges similar wrongful actions on the part of other railroad companies which had constructed lines within the plaintiff's territory under the authority of the Act of February 28, 1902, *supra;* whose action it is said it was the duty of defendant to supervise, and in substance alleges that by reason thereof the defendant became liable to plaintiff in damages under the provisions of said act and the Treaty of 1866.

For a third cause of action, the plaintiff alleges that Section 15 of the Act of February 28, 1902, *supra*, provided that before any railroad should be constructed on any lands taken for railroad purposes full compensation for the lands taken and for damages done by the construction should be made to the tribe; that Section 16 thereof further provided that the companies constructing railroads under the Act of February 28, 1902, should pay to the Secretary of the Interior for the benefit of the nation through the lands on which the railroad was constructed an annual charge of $15 a mile for each mile of road constructed, but that defendant has failed to collect the compensation due.

For a fourth cause of action, plaintiff alleges that under Section 11 of the Act of April 26, 1906, 34 Stat. 137, the defendant was required to collect all revenues of whatever character accruing to the Creek Nation and that it therefore became the duty of defendant to collect for plaintiff the rents

and profits derived from plaintiff's lands thus unlawfully intruded upon by the railroads, but that in violation of its duties defendant permitted the railroad companies to collect the rents from plaintiff's land, thus depriving plaintiff of the benefits thereof, and that defendant has never accounted to plaintiff for these rents and profits.

For a fifth cause of action, plaintiff alleges that Section 18 of the Act of April 26, 1906, *supra*, requires the Secretary of the Interior to bring suit for the collection of any monies or the recovery of any lands claimed by the Creek Nation, and the United States courts in Indian Territory were given jurisdiction to try and determine such suits; that plaintiff has been deprived of the benefits of this provision by reason of the defendant failing to comply therewith, and by reason of its failure so to act defendant is liable to plaintiff for its violation of Section 18.

[fol. 26] By Article V of the treaty referred to in plaintiff's petition, plaintiff Indians granted a right-of-way through their lands to any company that should be duly authorized by Congress and should undertake to construct a railroad from north to south and from east to west through the Creek country and agreed to sell to the United States a strip of land (not owned or occupied by a member or members of the Creek Nation lying along the line of the contemplated railroad) three miles in width.

This authority could only be given by the enactment of a statute which was evidently contemplated by the Treaty.

Accordingly a statute was passed (Act of February 28, 1902, *supra*,) which provided for the construction of a railway or railways across the domains of the plaintiff tribe which specified particularly that the railway companies might take and use for the purpose of the railway and no other purpose, a right-of-way 100 feet in width through the lands of plaintiff and also an additional strip of 200 feet in width in the length of 2,000 feet in addition to the right-of-way, for stations for every eight miles of road all to be used only for the construction and convenient operations of the railways.

The first and second causes of action are based in part on the provisions in the treaty that "the United States guarantees them (Creek Indians) quiet possession of their country." This is followed in the treaty by the clause "and protection against hostilities on the part of other tribes" together with other statements in the same connection.

We think this guarantee of quiet possession referred to hostilities on the part of other tribes and not to encroachments by railroads which are not alleged to have done anything against the will of the plaintiff. This construction is strengthened by other provisions in the treaty by which the Creeks agreed to the disposition of their land for railroad purposes, and also by the provisions of the statute which followed.

The guaranty of quiet possession upon which the plaintiff relies could not apply to the right-of-way granted by the treaty for the construction of railways on the lands taken for station purposes. It was not possible for the Indians to [fol. 27] have "quiet possession" of lands used in the operation of railways. The statute enacted in pursuance of the treaty specified under what conditions the land might be taken, also the payments which should be made therefor. The defendant was not taking or using the land. The provisions with reference to payments manifestly apply to railway companies and not to the United States. The defendant neither directly nor by implication agreed it would be liable for damages in event the railway companies did not comply with the statute but instead prescribed the course which plaintiff should take to obtain payment for its land or compensation for its unauthorized use.

A fatal defect of the first two counts is the failure to show or allege any agreement or promise which would make the defendant liable for the action of third parties, which was held in effect to be necessary in the case of the *Choctaw and Chickasaw Nations, supra.* In that case, like the one before us, the petition alleged that a treaty authorized the construction of railroads through the plaintiff's lands, that railroads were constructed under this authorization, and in the process of construction certain tracts of land were set aside as station grounds. The petition then continues with an allegation that the lands taken by the railroads for station grounds were not necessary for right-of-way purposes, were not granted to the railroads under the treaty, were unlawfully appropriated, and the defendant has refused to protect the plaintiff's rights. The petition was held insufficient and although no general rule was laid down in sustaining the demurrer one reason given was that "No treaty or act of Congress is cited wherein the Government assumed liabilities of the character claimed in positive language * * *". The decision reviews the provisions of the Act

of 1902 upon which the plaintiff relies and gives as an additional reason for its ruling that there is "no provision of the act imposing liability upon the Government as herein claimed." (Page 501 of the opinion.)

There are other authorities which support this ruling.

In the case of the *Nez Percé Tribe of Indians* v. *United States*, 95 C. Cls. 1, certiorari denied May 25, 1942, it was [fol. 28] held that a provision in a treaty that no white man shall be permitted to reside upon the reservation of the Indians did not create an obligation on the part of the United States to respond in damages in event there was wrongful intrusion by the whites. This case also holds in effect that where a treaty does not expressly so provide, its violation by third parties will not impose upon the Government an obligation to respond in damages.

In *Pine Hill Company* v. *United States*, 259 U. S. 191, 196, the Supreme Court said: "A liability in any case is not to be imposed upon a government without clear words" and it is a well settled rule that the Government can not be sued without its consent which does not appear from either the Treaty or the Act of 1902.

The substance of the third count is that the plaintiff has not been paid for its lands taken for railway purposes and damages done, in accordance with the statute pleaded, and that it was the duty of the defendant to collect the compensation due; that defendant has failed to perform its duty in that respect and is consequently liable to plaintiff.

The statute provided that certain payments should be made before the land should be taken and also afterwards, but it nowhere required the defendant to collect such payments or make them. Instead it either directly provided that the constructing railways should pay whatever was due or made it plain that it was so intended without creating any liability on the part of the defendant. There is nothing in the statute from which it could even be implied that defendant would be liable if the payments were not made in accordance therewith. This count is therefore subject to the same general objections as counts one and two.

It will be observed that the fourth count of the petition seeks to recover rents and profits that are alleged to have been unlawfully collected by railroad companies wrongfully permitted to intrude upon plaintiff's lands. The statute upon which plaintiff relies, Act of April 26, 1906, *supra*, provides in section 11 thereof that "all revenues . . .

accruing to the Creek Nation shall be collected" by an [fol. 29] officer of the Department of the Interior, but the cause of action stated in this count is based upon an alleged trespass which, if committed, would not create any "revenues" but merely give cause for an action for trespass. It is obvious that the statutory provision upon which plaintiff bases this count has no application to the claim made in this count, and that nothing is stated therein which would furnish the basis for a suit to recover damages from the defendant on any ground.

As before stated the fifth cause of action alleged that Section 18 of the Act of April 26, 1906, *supra*, required the Secretary of the Interior to bring suit for the use of the Creek Nation for the collection of any moneys or for the recovery of any lands claimed by the Creek Nation. This fifth count does not expressly allege any duty on the part of the defendant but it is manifestly framed on the theory that if was the duty of the Secretary of the Interior to bring such suit or suits. The plaintiff, however, misstates the language of the section to which reference is made for it does not require the Secretary to take such action but merely authorized him to bring suit and makes no provision for liability on the part of the defendant in case he failed to do so.

The plaintiff contends that although the Act is permissive in form it is mandatory in effect but the authorities cited do not sustain any such general rule.

The act last cited was entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes" and applied not only to the Creek Indians but the other four civilized tribes. It merely gave the Government permission in settling the affairs of these tribes to bring suit on claims made by them but did not require the defendant so to do. Here again there is no provision imposing liability if the Government fails to bring suit or anything from which such an obligation can be implied and the fifth count must also be held to state no cause of action.

In this connection, the plaintiff cites the case of the *United States* v. *Creek Nation*, 295 U. S. 103, 109, but the decision in this case was based upon facts which showed a direct liability on the part of the defendant and it has no application here.

[fol. 30] In all of the counts except the last, it is alleged in substance that the acts of the defendant constituted a violation of its duties but these allegations with reference to the "duty" of the defendant are merely conclusions of law and add nothing to the effect of the pleading.

For the reasons stated above, the petition as a whole must be held to state no cause of action but there is another and decisive reason for holding the first four counts insufficient.

The statute providing for the construction of railways through the lands of the plaintiff (Act of February 28, 1902, *supra*), made provisions both for ascertaining the amount due either the tribe or individual occupants of the land taken and for the payment thereof and further provided in Section 8 of the statute last referred to above "that the United States court for the Indian Territory and such other courts as may be authorized by Congress shall have, without reference to the amount in controversy, concurrent jurisdiction over all controversies arising between the said Enid and Anadarko Railway Company and the nation and tribe through whose territory said railway shall be constructed," and also made a like provision with reference to the inhabitants of the nation or tribe and the railway company. The same provisions were also made applicable by the act with reference to the construction of a railway through the Indian lands by any other company duly authorized.

If a railway exceeded its rights in taking over the lands of plaintiff or failed to discharge its obligations to the Indians, then it became directly liable under the statute. It is the railway companies which are alleged to have violated the rights of the plaintiff nation and by such violation, if any, a controversy was created between the railways and the plaintiff nation. A full and complete remedy was provided by the statute in case any controversy should arise, but the remedy created was an action against the railway company and not one against the United States.

Plaintiff does not dispute the validity of this statute but relies upon it in stating the amount of land and the purpose for which it might be taken in constructing the railway. The provisions for determining the amount to be paid and enforcing the collection thereof are too long to set out here [fol. 31] but the United States is not a party to the proceedings under them and is not responsible in case the plain-

tiff failed to make use of them. The statute as a whole shows plainly that the constructing railway companies were solely accountable to the plaintiff for the land taken or used.

It thus appears that whatever duties growing out of the construction of the railways the defendant may have owed the plaintiff tribe, all have been discharged by the enactment of this statute which made elaborate provisions, not only for the determination by duly appointed referees of the amount due the Indians for their land taken or used, but also for the enforcement of any payments specified by the statute and the settlement of any controversy in relation thereto by conferring jurisdiction on a local United States court over all of these matters.

It must be presumed that the referees and other officers together with the courts discharged their duties under this statute and whenever any controversy arose by reason of the Indians making claim that they had not received the amount to which they were entitled as payment for their lands or use thereof, or denied in any way compensation to which they were entitled, their claims were heard and determined and they received what was due them accordingly. Now, long after the railways have been constructed (as the Court will take judicial notice), and proceedings in the forum provided for plaintiff have been barred on the claims now presented by the statute of limitations, the plaintiff tribe comes into court and seeks to set up new claims never before presented, upon which, if valid, it ought to have acted long ago.

There is nothing in the treaty or in the statute enacted pursuant to it that required the defendant to supervise the payments made to the Indians for the land taken by the railways, determine the amount which should be paid and require its payment for the benefit of plaintiff. On the contrary, the statute provided for the disposition of these matters by the referees and the courts.

The petition fails to allege any facts which would establish any liability or make the defendant in any way subject to suit by the plaintiff and for the reasons stated above we hold [fol. 32] that no cause of action is set out either by the several counts of the petition or the petition taken as a whole.

The defendant raises the objection as to part of the claims made by plaintiff that they are barred by the statute of limitations. What we have said above makes it unnecessary to

pass on this issue but it may be said that the objection evidently overlooks the provisions of the Act of August 16, 1937, 50 Stat. 650, which was passed after the expiration of the time for filing a petition herein under the original act and gave this court authority to hear plaintiff's case notwithstanding lapse of time or statute of limitations.

The demurrer to the petition must be sustained and the petition dismissed. It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

[fols. 33-34] VI. JUDGMENT OF THE COURT.—June 1, 1942

This case was submitted upon the defendant's demurrer to the plaintiff's second amended petition; on consideration whereof the court is of opinion that the demurrer is well taken:

It Is Therefore Adjudged And Ordered that the defendant's demurrer be sustained and that the petition be and the same is hereby dismissed.

[fol. 35] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 36] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 321

ORDER ALLOWING CERTIORARI—Filed October 19, 1942

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 322

THE SEMINOLE NATION, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 21, 1942.

CERTIORARI GRANTED OCTOBER 19, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 322

THE SEMINOLE NATION, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 24, 1942.

—1775

[fol. 1]

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. L-88

THE SEMINOLE NATION

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

The original petition was filed March 21, 1930.

On April 30, 1930, a general traverse was filed by defendant.

On November 30, 1931, on motion made therefor and allowed by the court, the defendant filed a demurrer.

On December 8, 1931, the case was argued and submitted on defendant's demurrer to petition.

On May 2, 1932, the court filed an Order overruling without prejudice the defendant's demurrer to petition.

On May 5, 1932, a general traverse was filed by defendant.

On June 4, 1932, the defendant filed a motion to require [fol. 2] the plaintiff to make petition more definite and certain.

On June 16, 1932, the defendant filed a motion for rehearing on its demurrer to petition.

On August 26, 1932, the defendant's motion to make petition more definite and certain was order to the Law Calendar for oral argument.

On October 10, 1932, the case was argued and submitted on defendant's motion to make petition more definite and certain.

On November 14, 1932, the court filed an Order allowing defendant's motior for a new trial, sustaining defendant's demurrer to petition and dismissing said petition.

On November 25, 1932, plaintiff filed a motion to reinstate case and to permit same to be argued on demurrer, and said motion was allowed by the court on December 8, 1932.

On February 14, 1933, on motion made therefor, and allowed by the court, the plaintiff filed its amended petition [fol. 3] which is as follows:

II. Amended Petition—Filed February 14, 1933

(Original Petition filed March 21, 1930)

To the Honorable the Court of Claims:

The plaintiff, the Seminole Nation, respectfully represents:

That for its first cause of action the plaintiff states:

I

That by a certain Act of Congress, approved May 20th, 1924 (43 Stat. 133, as modified by Joint Resolution approved May 19, 1926, 44 Stat. 568, giving permission to [fol. 4] file separate petitions, and Joint Resolution of February 19, 1929, 45 Stat. 1229, extending the time for filing suits until June 30, 1930), plaintiff was authorized and empowered to bring this action.

II

That by a treaty made on the 21st day of March, 1866 (14 Stat. 785), between the United States and the Seminole Nation, said Seminole Nation became owner in fee of certain lands now within the boundaries of the State of Oklahoma, which constituted its National Domain; that by said treaty said National Domain was solemnly guaranteed by the United States to said Seminole Nation.

III

That Article V of said Treaty of 1866 granted a right-of-way from east to west or south through the Seminole National Domain. Said Article V provides in part as follows:

"The Seminole Nation hereby grants a right-of-way through their lands to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point on their eastern to their western or southern boundary;"

That thereunder it became the duty of defendant to supervise the grant of said right-of-way to said railroad [fol. 5] company duly authorized by Congress to construct a road through the Seminole National Domain; to execute

properly the provisions of said Article V; and to protect plaintiff in the quiet possession of the lands of its National Domain not so granted, as provided by Article I of said Treaty of 1866.

IV

That under said Article V, the Atlantic and Pacific Railroad Company was authorized to construct a line of railroad from the east line of the Seminole National Domain to the west or south line thereof.

That all rights of said Atlantic and Pacific Railroad Company were assigned to the St. Louis and San Francisco Railroad, and that said last named company constructed said line of railroad. That in constructing said line of railroad, it appropriated as a right-of-way therefor, a strip of land 200 feet wide, extending from said east line of the Seminole National Domain to the south line thereof.

V

That defendant, in violation of its duties under said Article V, and of the rights of the plaintiff to lands of its National Domain so guaranteed under said Treaty of 1866, permitted said railroad company to stake out what are known as "station reservations" along its said 200 feet of [fol. 6] right-of-way. That said reservations consist of an additional strip of land on each side of said right-of-way, each of said reservations containing approximately 20 acres, which were unauthorized and unlawful intrusions upon the lands of the Seminole National Domain.

VI

That said additional lands so staked out as above described were not necessary to the right-of-way of said railroad company or to the operation of its said railroad; that said lands were not granted or ceded by said Seminole Nation under said Article V of said Treaty of 1866; and that the staking out of each of said "station reservations," above described, was an unauthorized intrusion by said railroad company upon the lands of said Seminole Nation, permitted by defendant.

VII

That said railroad company has never used, and is not now using, said lands for the purposes of operating its said

railroad, but due to defendant's neglect of duty as aforesaid, has rented and is now renting the same for meadows, farm land, and, where said "station reservations" are in cities and towns, has leased the same for business purposes unconnected with the operation of said railroad company, and has caused to be erected thereon, stores, warehouses, lumber yards, and other mercantile houses entirely uncon- [fol. 7] nected with the operation of said railroad company, renting the same to tenants and deriving a profit therefrom.

VIII

That after a thorough investigation and diligent search plaintiff is unable to find records in the Department of the Interior accurately describing the number of the several "station reservations" and is informed and believes and therefore avers that the only record accurately describing the number and location of each of said reservations was a certain book formerly in the Office of the Superintendent of the Five Civilized Tribes at Muskogee, Oklahoma, which said book, plaintiff is informed and believes and therefore avers, is lost and destroyed. But that the location and number of said reservations are well known to certain officers and agents of defendant and that said reservations are well defined by marks and boundaries along said right-of-way, and can be readily located upon the taking of proof in this case.

IX

That said intrusions by said railroad company upon the said Seminole National Domain, so permitted by defendant, were violations of the rights of plaintiff under Article V of said Treaty of 1866; that by defendant's failure to execute properly its duties thereunder the plaintiff has been deprived of the quiet possession and enjoyment of said lands provided for in Article I of said Treaty of 1866; [fol. 8] and that defendant, well knowing the facts as above set forth, has failed, neglected and refused to put plaintiff in possession of same, and therefore is liable for the damage resulting to plaintiff from defendant's failure to perform properly its obligations under said Treaty of 1866.

PLAINTIFF'S SECOND CAUSE OF ACTION

That for its second cause of action plaintiff states:

I

That plaintiff restates and repleads Paragraphs I and II of its first cause of action.

II

That under the general provisions of the Act of Congress, approved February 28, 1902 (32 Stat. 43), other railroad companies desiring to construct lines through the Seminole National Domain were authorized to appropriate rights-of-way under the conditions prescribed therein. Thereunder it became the duty of defendant to supervise the grants of said rights-of-way to said railroad companies constructing lines of road through the Seminole National Domain, and to execute properly the provisions of said act.

III

That in addition to the railroad provided for in plaintiff's first cause of action, certain other railroad companies acquired rights-of-way of 200 feet in width through the [fol. 9] Seminole National Domain, under the terms of said Act of February 28, 1902, which said roads are particularly described as follows, to-wit:

A certain railroad, now the Missouri, Kansas and Texas Railroad Company, extending from a point on the western boundary, in and through said Seminole Nation to the southern boundary thereof; and a certain railroad now known as the Chicago, Rock Island and Pacific Railroad Company; extending from the eastern boundary of said Seminole Nation to the western boundary thereof.

IV

That defendant in disregard of the provisions of said Act of February 28th, 1902, and of the rights of the plaintiff, and in violation of its covenant to guarantee to the plaintiff the quiet possession of its National Domain under the provisions of said Treaty of March 21st, 1866, permitted each of said railroad companies to stake out what are

known as "station reservations" along said 200 feet of rights-of-way. That said reservations consist of an additional strip of land on each side of said rights-of-way, each of said reservations containing approximately 20 acres, which were unauthorized and unlawful intrusions upon the lands of the Seminole National Domain.

[fol. 10]

V

That said additional lands so intruded upon as above described, were not necessary to the rights-of-way of said railroad companies or to the operation of their said railroads; that said lands were not granted under said Act of February 28th, 1902; and that the staking out of each of said "station reservations" above described, was an unauthorized intrusion by said railroad companies upon the lands of said Seminole Nation, permitted by defendant.

VI

That plaintiff restates and repleads Paragraphs VII and VIII of its first cause of action, so as to make said facts applicable to each of the above named roads.

VII

That said intrusions by said railroad companies upon the said Seminole National Domain, so permitted by the defendant, were violations of the rights of the plaintiff under the said Act of February 28th, 1902; that by defendant's failure to execute properly its duties thereunder, the plaintiff has been deprived of the quiet possession and enjoyment of said lands provided for in Article I of said Treaty of March 21st, 1866; and that defendant, well knowing the facts as above set forth, has failed, neglected and refused [fol. 11] to put plaintiff in possession of same, and therefore is liable for the damage resulting to plaintiff from defendant's failure to perform properly its obligations under said Act of February 28th, 1902, and said Treaty of 1866.

PLAINTIFF'S THIRD CAUSE OF ACTION

For its third cause of action plaintiff states:

I

That plaintiff restates and repleads Paragraphs I and II of its first cause of action, and Paragraphs II and III of its second cause of action.

II

That Section 15 of the Act of February 28th, 1902 (32 Stat. 43), provides in part as follows:

"Sec. 15. That before any railroad shall be constructed or any lands taken or condemned for any of the purposes set forth in the preceding section, full compensation for such right-of-way and all land taken and all damage done or to be done by the construction of the railroad, or the taking of any lands for railroad purposes, shall be made to the individual owner, occupant, or allottee of such lands, and to the tribe or nation through or in which the same is situated."

III

That plaintiff is informed and believes and therefore [fol. 12] avers that no such compensation for said lands of the Seminole National Domain, appropriated under the provisions of said Section 15, was ever paid by said railroad companies.

IV

That Section 16 of said Act of February 28th, 1902, provides in part as follows:

"Sec. 16. That where a railroad is constructed under the provisions of this Act there shall be paid by the railway company to the Secretary of the Interior, for the benefit of the particular tribe or nation through whose lands any such railroad may be constructed, an annual charge of fifteen dollars per mile for each mile of road constructed, the same to be paid so long as said lands shall be owned and occupied by such nation or tribe, which payment shall be in addition to the compensation otherwise provided herein."

V

That plaintiff is informed and believes and therefore avers that said annual charge of fifteen dollars per mile for each mile of road constructed has never been so paid in full to date by said railroad companies to the Secretary of the Interior, for the benefit of said Seminole Nation.

VI

That the Seminole Nation has owned and occupied and now so owns and occupies the lands constituting said rights-

of-way; that plaintiff is informed and believes and there-
[fol. 13] fore avers that defendant, in violation of its obligations under said Act of February 28, 1902, and under said Sections 15 and 16 thereof, has failed, neglected and refused to collect the compensation provided therein for the benefit of the plaintiff; that defendant has never accounted to the plaintiff in full to date for said compensation, thus depriving plaintiff of the benefits provided therein; and therefore defendant is liable to plaintiff for defendant's failure to perform properly its said obligations.

PLAINTIFF'S FOURTH CAUSE OF ACTION

That for its fourth cause of action the plaintiff states:

I

That plaintiff restates and repleads Paragraphs I to VIII of its first cause of action and Paragraphs II to VI of its second cause of action.

II

That Section 11 of the act approved April 26, 1906 (34 Stat. 137), states in part, as follows:

"Sec. 11. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes, * * * shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him, * * *"

[fol. 14]

III

That under said Section 11 it became the duty of defendant to collect the rents and profits derived from plaintiff's lands, but that in violation of its duties the defendant permitted said railroad companies to rent plaintiff's lands unlawfully intruded upon, and to collect said rents and profits and to convert same to their own uses, thus depriving plaintiff of the benefits thereof; and for said failure, neglect and refusal of defendant to perform its said duties, defendant became liable to plaintiff for the amounts of said rents and profits, and that defendant has never accounted to plaintiff for the amounts of same.

PLAINTIFF'S FIFTH CAUSE OF ACTION

That for its fifth cause of action, the plaintiff states:

I

That plaintiff restates and repleads Paragraph I of its first cause of action.

II

That plaintiff restates and repleads all of the unlawful and unauthorized acts of said railroad companies and the wrongs perpetrated by same upon the plaintiff, known to and unlawfully permitted by the defendant, and all facts relative thereto, as set forth in plaintiff's first, second, third and fourth causes of action.

[fol. 15]

III

That Section 18 of the Act of Congress, approved April 26, 1906 (34 Stat. 137), provides in part, as follows:

"Sec. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the * * * Seminole * * * tribe * * * for the collection of any moneys or recovery of any land claimed by * * * said tribe * * * and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits."

IV

That although said facts as herein set forth were well known to defendant for many years, yet in violation of its express duties under said Section 18 of said Act of April 26, 1906, it has failed, neglected and refused to bring suits for the collection of the moneys due from said railroad companies, or for the recovery of the lands wrongfully intruded upon and claimed herein by the Seminole Nation, although often requested by plaintiff so to do; that by defendant's failure, neglect and refusal to perform its said duties under said Section 18, it became liable to the plaintiff for the com-

[fol. 16] pensation and the value of said lands of which the plaintiff has been so unlawfully deprived.

V

That at all times mentioned herein the plaintiff has had no redress, or now has the means or the right to recover in its own name said lands thus intruded upon, or to so collect the said compensation to be paid for the benefit of plaintiff as herein set forth, except through the action of the United States.

Wherefore, the premises considered, plaintiff prays:

1. That under plaintiff's first and second causes of action defendant be required to account for the lands of said "station reservations" so unlawfully intruded upon, and that judgment be entered against the defendant for the full present value of same.

2. That under plaintiff's third cause of action defendant be required to account for the collection of said compensation for the benefit of plaintiff as therein set forth, and that judgment be entered against defendant for the amounts found to be due plaintiff which were not so collected by defendant.

3. That under plaintiff's fourth cause of action defendant be required to account for the rents so collected by said railroad companies which defendant unlawfully permitted [fol. 17] to be misappropriated and diverted from the funds of plaintiff, and that judgment be entered against the defendant for its failure to so collect the amounts of said rents and profits.

4. That under plaintiff's fifth cause of action defendant be required to account for the lands and moneys of which plaintiff has been so unlawfully deprived because of the failure, neglect and refusal of defendant to file and prosecute suits to recover same for the benefit of the plaintiff, and that judgment be entered against defendant for the full present value of said lands, and for the amounts of money so found to be due plaintiff.

5. That on all of said items due plaintiff, interest be allowed at the rate of six per cent from the dates of said unlawful acts so complained of herein.

The Seminole Nation, by E. J. Van Court, Its Attorney of Record. Of Counsel: J. B. Campbell, P. M. Nichols, E. L. Ewing.

[fol. 18] *Duly sworn to by E. J. Van Court. Jurat omitted in printing.*

[fol. 19] III. Demurrer to Amended Petition—Filed January 29, 1942, by Leave of Court

Now comes the defendant and demurs to each of the alleged causes of action in the amended petition separately, upon the grounds that (1) the allegations of neither of the alleged causes of action state facts sufficient to constitute a cause of action against the defendant, and (2) the Court has no jurisdiction over the subject matter of either of the alleged causes of action, because no facts are alleged in either thereof which state a claim arising out of any treaty, agreement, or Act of Congress.

Defendant demurs to each of the alleged causes of action numbered four and five upon the additional ground that the claims attempted to be alleged therein are first stated in the amended petition which was not filed within the time specified in the Jurisdictional Act of May 24, 1924, 43 [fol. 20] Stat. 139, as extended by the Joint Resolution of February 19, 1929, 45 Stat. 1229.

Respectfully submitted, Norman M. Littell, Assistant Attorney General. Raymond T. Nagle, Charles H. Small, Attorneys.

[fols. 21-22] IV: Argument and Submission of Case

On March 2, 1942, the case was argued and submitted on defendant's demurrer by Mr. Charles H. Small for defendant, and by Mr. Paul M. Niebell for plaintiff.

V. Order of Court Sustaining Defendant's Demurrer and Dismissing Petition

This case was submitted to the court on the defendant's demurrer to the plaintiff's petition as amended along with the case of The Creek Nation, No. F-369, this day decided; and the question in the two cases being the same, therefore, It Is Ordered this 1st day of June, 1942, on authority of

said Creek case that the demurrer be and the same is sustained, and the petition is dismissed.

By the Court.

Richard S. Whaley, Chief Justice.

[fols. 23-24] VI. JUDGMENT OF THE COURT—June 1, 1942

This case was submitted upon the defendant's demurrer to the plaintiff's amended petition; on consideration whereof the court is of the opinion that the demurrer is well taken:

It Is Therefore Adjudged and Ordered that the defendant's demurrer be sustained and that the petition be and the same is hereby dismissed.

[fol. 25] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 26] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 322

ORDER ALLOWING CERTIORARI—Filed October 19, 1942

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 21 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 321

THE CREEK NATION,

Petitioner,

vs.

THE UNITED STATES.

No. 322

THE SEMINOLE NATION,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

PAUL M. NIEBELL,
C. MAURICE WEIDEMEYER,
W. W. PRYOR,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 321

THE CREEK NATION,

Petitioner,

vs.

THE UNITED STATES.

No. 322

THE SEMINOLE NATION,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

The Creek and Seminole Nations of Indians pray that writs of certiorari issue to review the judgments of the Court of Claims entered in the above cases on June 1, 1942.

Opinion Below.

The opinion of the Court of Claims is not as yet reported (Creek case, R. 12-21).

Jurisdiction.

The judgment of the Court of Claims was entered on June 1, 1942 in both the Creek and Seminole cases (Creek case, R. 21; Seminole case, R. 11-12). The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (Sec. 288 of the Judicial Code, as amended, 28 U. S. C. A. 129).

Statutes Involved.

The special jurisdictional Act approved May 24, 1924, c. 181; 43 Stat. 139, reads in part as follows:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, * * *"

The special jurisdictional act of the Seminole Nation was approved May 20, 1924, c. 162, 43 Stat. 133, and is substantially the same as the above act of the Creek Nation.

The Act of August 16, 1937, c. 651, 50 Stat. 650, provides in part as follows:

> "That in suits heretofore filed in the United States Court of Claims by the Five Civilized Tribes under their respective Jurisdictional Act * * * plaintiffs therein shall have the right, prior to January 1, 1938, to amend their petitions to conform to any evidence heretofore filed in said suits, whether such amended petitions develop original claims or present new claims based upon said evidence; and jurisdiction be, and is hereby, conferred upon said Court of Claims, notwithstanding the lapse of time or statutes of limita-

tion, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which may have been presented by said Indian Nations in any amended petitions heretofore filed, or which may be filed under the terms of this Act; and claims so presented shall be adjudicated by said court upon their merits as though presented by petition filed within the time limited by said respective original Jurisdictional Acts, as amended * * *."

The Treaty of June 14, 1866, 14 Stat. 785-787, between the Creek Nation and the United States provides in part as follows:

"Article 1. * * * They also agree to remain at peace with all other Indian tribes; and, in return, the United States guarantees them quiet possession of their country, and protection against hostilities on the part of other tribes. * * *"

* * * * * * * *

"Article 5. The Creek Nation hereby grant a right of way through their lands to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south of the Creek country, and likewise from any point on their eastern to their western or southern boundary, but said railroad company, together with all its agents and employees, shall be subject to the laws of the United States relating to intercourse with Indian tribes, and also to such rules and regulations as may be prescribed by the Secretary of the Interior for that purpose, * * *"

Articles 1 and 5 of the Treaty of March 21, 1866, 14 Stat. 755, between the Seminole Nation and the United States, contain substantially the same provisions as those of the Creek treaty above quoted.

The Act of February 28, 1902, c. 134, 32 Stat. 43, 47, 48, provides in part as follows:

"Sec. 15. That before any railroad shall be constructed or any lands taken or condemned for any of the purposes set forth in the preceding section, full compensation for such right of way and all land taken and all damage done or to be done by the construction of the railroad, or the taking of any lands for railroad purposes, shall be made to the individual owner, occupant, or allottee of such lands, and to the tribe or nation through or in which the same is situated; * * *"

"Sec. 16. That where a railroad is constructed under the provisions of this Act there shall be paid by the railway company to the Secretary of the Interior, for the benefit of the particular tribe or nation through whose lands any such railroad may be constructed, an annual charge of fifteen dollars per mile for each mile of road constructed, the same to be paid so long as said lands shall be owned and occupied by such nation or tribe, which payment shall be in addition to the compensation otherwise provided herein."

The Act of April 26, 1906, c. 1876, 34 Stat. 137, 141, 144, provides in part as follows:

"Sec. 11. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes, * * * shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him;"

* * * * * * *

"Sec. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the * * * Creek, or Seminole tribes, * * * for the collection of any moneys or recovery of any land claimed by * * * said tribes * * * and the United States courts in

Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits."

Questions Presented.

The questions presented are as follows:

1. Whether the United States, as guardian of the Creek and Seminole Nations, can knowingly permit railroad companies to fence up and segregate from the lands of said tribes what are known as "station reservations" which were never used for railroad purposes, and thus permit unlawful intrusions upon the lands owned by said tribes in fee simple, and then fail and refuse to act to protect the interests of said tribes, without becoming liable for the resulting loss occasioned to its Indian wards.

2. Whether the United States is liable to the Creek and Seminole Nations for its failure to enforce against said railroad companies on behalf of said tribes the guarantee of quiet possession to lands of their national domain intruded upon by said railroad companies, which guarantee is contained in the treaties with said Indian tribes.

3. Whether or not the United States is liable to the Creek and Seminole Nations for its failure to collect for the benefit of the tribes the rents and profits derived by said railroads from the lands of petitioners, thus unlawfully intruded upon and held by said railroad companies.

4. Whether the United States, as guardian of said tribes, is liable to them for its failure to enforce against said railroad companies for the benefit of said tribes the provisions of statutes passed for their benefit.

5. Whether the United States, as guardian of petitioners, is liable for its failure to enforce against said railroad

companies the provisions of the Act of February 28, 1902, c. 134, 32 Stat. 43, prescribing benefits for petitioners.

6. Whether the Act of April 26, 1906, c. 1876, 34 Stat. 137, is mandatory in effect, requiring the United States, as guardian, to act to protect the property interests of its Indian wards.

Statement.

These cases involve the same issues and came before the lower court on demurrer to the amended petitions filed by petitioners. As the Creek and Seminole treaties of 1866 are substantially the same, and the subsequent statutes involved apply to the Creek and Seminole Nations alike, the decision of the lower court in the Creek case applies equally to the Seminole case. To simplify our discussion we have confined it to the Creek case and request that the Court consider it as applicable equally to the Seminole case.

The petition embodies five causes of action, the facts of which are admitted by the demurrer. We outline the facts briefly as follows:

First Cause of Action.

The Creek Nation owned its national domain in fee simple (Treaty of February 14, 1833, Arts. 2, 3, 7 Stat. 417, 418-419).

By Treaty of June 14, 1866, 14 Stat. 785, 786 (Art. 3) the Creek Nation ceded to the United States one half of its entire domain, and retained the eastern half as its permanent national domain. By Article 5 of said treaty the Creek Nation granted a right of way to two railroads duly authorized by Congress, and with the express consent and approbation of the Secretary of the Interior, to construct railroads through the Creek national domain. Article 3 provided that the United States guarantee to the Creek Nation quiet possession of the lands not granted in said treaty.

The two treaty railroads constructed lines through the Creek domain under the provisions of said treaty of 1866. However, in addition to the right-of-way granted by the treaty, said railroads intruded upon and fenced up various twenty acre tracts at points along said rights-of-way, which were called "station reservations". These "station reservations" were not essential to the operation of said railroads, and were never used for railroad purposes, but have been leased and rented by said railroad companies to third parties for purposes other than for railroad purposes, and said lands have provided a considerable source of revenue to said railroads for the lands owned by petitioners.

These violations of the treaty by said railroad companies were well known to respondent, but it permitted them to continue to exist; and although the respondent was in duty bound to supervise the action of said railroads under said Article 5, and to enforce for the benefit of petitioners the guarantee of quiet possession contained in said treaty, yet respondent took no steps to put petitioner in possession of its lands, and thus petitioner has been deprived of the use and possession of same, and the rents and profits derived by said railroads therefrom. And because of said failures of respondent to comply with said treaty, petitioner contends that respondent is liable for the loss occasioned to petitioner (Creek case, R. 2-5; Seminole case, R. 2-4).

Second Cause of Action.

The second cause of action is similar to the first cause of action, except that the authority of said railroad companies to construct lines through the Creek national domain was not derived from the Treaty of June 14, 1866, but arose out of the provisions of the Act of February 28, 1902, c. 134, 32 Stat. 43. Under this act various other railroads were authorized to construct lines through the Creek national domain, under the conditions prescribed in said act.

These railroads also intruded upon and fenced up "station reservations" in addition to the lands taken for the right of way, as did the two treaty railroads. These "station reservations" were not necessary for the operation of said railroads, and were never used for railroad purposes, but were leased and rented out by said railroad companies to third parties for purposes other than for railroad purposes, which have provided a considerable source of revenue to said railroad companies from the lands owned by petitioner.

These conditions were well known to respondent, but it permitted them to continue to exist; and although the respondent was in duty bound to supervise the action of said railroads under said Act of February 28, 1902, to enforce for the benefit of petitioners the guarantee of quiet possession contained in the Treaty of June 14, 1866, and to enforce the provisions of said Act of 1902 for the benefit of petitioners, yet respondent took no steps to put petitioner in possession of its lands, and thus petitioner has been deprived of the use and possession of same, and the rents and profits derived by said railroads therefrom. And because of said failures of respondent to comply with said treaty and to enforce said Act of February 28, 1902, petitioner contends that respondent is liable for the loss occasioned to petitioner (Creek case, R. 5-7; Seminole case, R. 5-6).

Third Cause of Action.

The third cause of action sets forth the failure of respondent to enforce Sections 15 and 16 of the Act of February 28, 1902 against said railroads for the benefit of petitioner.

Under Section 15 of said act the railroads were required to pay to the tribe compensation for the lands taken for railroad purposes. It is alleged that no such compensa-

tion was paid petitioners under the provisions of said Section 15.

Under Section 16 of said act the railroads were required to pay to the Secretary of the Interior for the benefit of the tribe an annual charge of fifteen dollars per mile for each mile of road constructed. It is alleged that the respondent failed to collect this annual charge for the benefit of petitioner under said Section 16 (Creek case, R. 7-9; Seminole case, R. 6-8).

Fourth Cause of Action.

The fourth cause of action sets forth the failure of respondent to comply with Section 11 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 141. Under this provision the Secretary of the Interior was directed to collect *all* revenues due said Indian tribes. However, respondent failed to collect the rents and profits derived from the lands of petitioner wrongfully intruded upon by said railroad companies, and for said failure the petitioner contends respondent is liable for the amount of which it was so deprived (Creek case, R. 9; Seminole case, R. 8).

Fifth Cause of Action.

The fifth cause of action embodies all of the allegations of the four preceding causes, and simply stated, alleges that under Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, the Secretary of the Interior was authorized to bring suit for the collection of any moneys or for the recovery of any land claimed by these tribes. Although well knowing of the intrusions by the railroads upon the lands of petitioner, yet respondent failed to act on behalf of petitioner to recover the lands, or the profits derived therefrom. Thus petitioner has been deprived of the benefits of said Section 18, and petitioner contends that respondent is liable for the loss occasioned to it.

The petition further alleges that petitioner had no means of recovering in its own name the lands thus intruded upon, or to collect the moneys from said railroad companies, except through the action of the United States.

The petition prays that judgment be entered against respondent for the full present value of the lands embraced in said station reservations thus unlawfully intruded upon by said railroad companies, which respondent failed and refused to restore to petitioner after a full knowledge of the facts; that respondent be required to account to petitioner for the amounts respondent failed to collect for the benefit of petitioner under Sections 15 and 16 of said Act of February 28, 1902, and for the rents and profits from petitioner's lands thus unlawfully intruded upon, which respondent permitted said railroad companies to divert into their own coffers.

The lower court dismissed the petition, holding in effect, that respondent was not liable for its failure to enforce the guarantee of quiet possession contained in said Treaty of June 14, 1866; that respondent, as guardian of petitioner, owed petitioner no duty to act to protect the interests of its Indian wards from the inroads of said railroad companies, even though it was required to supervise the action of said railroads under the provisions of said treaty, and had a full knowledge of the facts; and, further, that respondent was not required under the Acts of February 28, 1902 and April 26, 1906 to enforce the benefits accruing to petitioner under the provisions of said acts, even though the petitioner was unable to act on its own behalf to protect its property interests, but was required to rely upon the action of the United States, its guardian (Creek case, R. 10-11; Seminole case, R. 9-10).

The petitioner believes that the lower court erred in this holding, and contends generally that the respondent, as trustee of petitioner, was required to take affirmative action

to protect the petitioner in the possession of its lands, and to protect petitioner in this case against the inroads of said railroad companies, and to enforce the provisions of the Treaty of 1866 on behalf of petitioner, after respondent had a knowledge of the facts, and when it was known to respondent that said railroads were intruding upon lands owned by petitioner and were not using them for railroad purposes. Also that respondent is liable to its ward for the failure to enforce against said railroad companies statutes passed for the benefit of petitioner.

Specification of Errors to Be Urged.

The court below erred:

1. In holding that the United States, as trustee of petitioner, is not required to act to protect the lands of petitioner from unlawful intrusion by railroad companies authorized to construct lines of railroad through the lands of petitioner, after respondent had a full knowledge of said intrusions, and when it by solemn treaty stipulation guaranteed to petitioner quiet possession of its national domain.

2. In holding that the guarantee of quiet possession by the United States to the Creek Nation in the Treaty of June 14, 1866, 14 Stat. 755, does not require the respondent to act to protect petitioner in the quiet possession of its lands, when respondent knew of intrusions by said railroad companies.

3. In holding that the United States, as guardian of petitioner, was under no duty to act to protect the petitioner in the receipt of the benefits prescribed by the Act of February 28, 1902, even though that act required the Secretary of the Interior to collect certain of the revenue due said Indian nation from said railroad companies.

4. In holding that the procedure prescribed by said Act of February 28, 1902, for the ascertainment of damages to

the Indian tribes for the right of user to lands necessarily taken for railroad purposes, provided a full and complete means for compensation said tribes for the value of the fee simple title to the lands of petitioner unlawfully intruded upon by said railroads, which lands were *never* used for railroad purposes.

5. In holding that the United States was not required to act under Section 11 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, to collect all revenue due petitioners from all sources, including the income derived by said railroad companies from the lands of petitioner thus unlawfully intruded upon, and leased by said railroads to third parties for commercial purposes.

6. In holding that the United States, as guardian of petitioner, was not in duty bound to file suit to recover from said railroad companies the lands of petitioner thus unlawfully intruded upon, and to recover the amounts received by said railroads from leases of said lands of petitioner, when respondent knew that petitioner was unable to proceed in its own behalf to protect its property interests, but was required to rely upon the action of the respondent for the needed protection of its interests.

7. In holding that said Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, is permissive and not mandatory in effect.

8. In holding that the respondent, as guardian of petitioner, is not liable to its ward when respondent ties the hands of its ward so that it cannot take legal steps of its own to protect its property interests, and respondent then itself fails and refuses to act to protect the property interests of its ward.

Reasons for Granting the Writ.

The Creek and Seminole Nations respectfully request this Court to grant certiorari to review the decision of the Court of Claims, for the reason that said decision is not in accord with the applicable decisions of this Court defining the duties of the United States, as guardian of these dependent Indian nations. The issues herein presented involve the provisions of the treaties between the United States and said Indian nations, and subsequent Acts of Congress governing the rights of railroads constructing railroads through the national domain of these nations, and the duty of the United States to protect these Indian nations from the unauthorized intrusions of said railroads upon the lands owned by said nations in fee simple.

We will discuss briefly the decision of the lower court and compare it with the decisions of this Court in an endeavor to show that said decision has failed to follow the rules laid down by this Court governing the duties of the United States to these dependent Indian wards.

In reviewing the title of the Creek Nation this Court, in *United States* v. *Creek Nation*, 295 U. S. 103, 109, said:

> "The Creek tribe had a fee simple title, not the usual Indian right of occupancy with the fee in the United States. That title was acquired and held under treaties, in one of which the United States guaranteed to the tribe quiet possession." (Treaty of February 14, 1833, Arts. 2 and 3, 7 Stat. 417; Treaty of June 14, 1866, Arts. 1 and 3, 14 Stat. 785, 786.)

By the Treaty of June 14, 1866, 14 Stat. 785, the Creek Nation ceded to the United States the western half of its entire domain, and reserved the eastern half as its permanent national domain (Art. 3), and Article 1 provided in part that "the United States guarantees them quiet possession of their country, and protection against hostilities on the part of other tribes."

Article 5 of said treaty provides in part as follows:

> "The Creek Nation hereby grant a right of way through their lands, to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south of the Creek country, and likewise from any point on their eastern to their western or southern boundary, * * *".

Thus by said Article 5 two railroads were granted a *right-of-way* through the Creek domain: The Atlantic and Pacific Railroad Company (now the Saint Louis and San Francisco Railroad), authorized to construct a railroad through Indian Territory by Act of July 27, 1866, c. 278, 14 Stat. 292; and the Missouri, Kansas and Texas Railroad, authorized to construct a railroad through Indian Territory by Act of July 26, 1866, c. 270, 14 Stat. 289.

A right-of-way 200 feet in width was taken by these railroad companies, and experience has shown that this right-of-way through a level, prairie country was sufficient for station grounds, etc. However, in addition to said 200 feet of right-of-way the railroads fenced up and intruded upon various tracts of petitioners' lands, each containing approximately 20 acres, which the railroads called "station reservations". These "station reservations" were not necessary for railroad purposes, as the stations were built within the lands of the right-of-way, and they have never been used for railroad purposes, but have been leased and rented by said railroads for commercial purposes.

The gravamen of our complaint is that while these railroads did acquire rights-of-way either by treaty or by statute, neither the treaty nor any statute gave them these 20 acre "reservations", which were not necessary to the enjoyment of the right-of-way, and upon which the railroads simply *intruded*.

The statement of the lower court that the Act of February 28, 1902, c. 134, 32 Stat. 43, was passed pursuant to the Treaty of June 14, 1866 is in error, for we have seen that just two railroads were granted rights-of-way under this treaty and the acts passed pursuant thereto. By said Act of February 28, 1902, Congress authorized railroads generally to acquire lands for rights-of-way and for other railroad purposes, and to construct railroads through Indian Territory, under conditions prescribed by said act. Although the Act of February 28, 1902 authorized the railroads to take lands *necessary* for railroad purposes, yet said act of 1902 does not authorize the railroads to take the lands of petitioners for uses *other than for railroad purposes.*

However, in addition to the right-of-way the railroads constructing railroads under this act fenced up and intruded upon various tracts of lands owned by petitioners and segregated therefrom "station reservations", as did the railroads under the Treaty of 1866. These "station reservations" were not necessary for railroad purposes, and they have never been used for railroad purposes, but have been leased and rented by said railroads for commercial purposes wholly unconnected with the operation and maintenance of said railroads.

The essence of the first and second causes of action is the claim for the value of the lands unlawfully included within these "station reservations". The United States, as guardian of petitioners, knew of these violations of the Treaty of 1866 and the Act of 1902, and the unlawful intrusions by the railroad companies upon the lands of petitioner, yet permitted these conditions to exist, and petitioners now contend that the respondent is liable for the value of said lands thus lost to petitioners because of the failure of respondent to enforce the protection guaranteed by it in the Treaty of 1866.

With respect to the first and second causes of action the lower court states (Creek case, R. 16):

> "A fatal defect of the first two counts is the failure to show or allege any agreement or promise which would make the defendant liable for the action of third parties, which was held in effect to be necessary in the case of the Choctaw and Chickasaw Nations, supra."

The petition in the *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494, was defective in that, as the lower court pointed out (p. 498):

> "No treaty or act of Congress is cited wherein the Government assumed liabilities of the character claimed in positive language * * *."

And after reviewing the provisions of the Act of 1902, the lower court further stated (p. 501) that there is "no provision of the act imposing liability upon the Government as herein claimed."

We drew our amended petitions with the Choctaw and Chickasaw case decision before us, and cited the treaties and acts of Congress under which we claimed the benefits. In this case we make no claim except for the protection guaranteed us by treaty and by statutes passed for our benefit. The distinction between the Choctaw and Chickasaw case and the case at bar was recognized by the lower court when it reinstated our case after the decision of the Choctaw and Chickasaw case (Creek case, R. 2). Clearly the decision in the Choctaw and Chickasaw case has no application to the case at bar.

We submit that the lower court erred in placing too narrow a construction on the guarantee of quiet possession made by the United States to the petitioners in said treaties of 1866. The lower court said (Creek case, R. 16):

> "We think this guarantee of quiet possession referred to hostilities on the part of other tribes and

not to encroachments by railroads which are not alleged to have done anything against the will of the plaintiff."

A mere glance at the Treaty of June 14, 1866 (Art. 1), shows that this construction is not justified. The treaty states:

"the United States guarantees them quiet possession of their country, and protection against hostilities on the part of other tribes. * * *"

Thus the treaty not only guarantees the Creek Nation quiet possession of their domain, but also protection against hostilities of other tribes.

While it is true that the guarantee of quiet possession does not apply to the rights-of-way granted to the railroads as the lower court points out (Creek case, R. 16), yet this guarantee does apply to the lands intruded upon by the railroad companies which were never used for *necessary* railroad purposes.

As we have heretofore seen, this Court in the Creek case, 295 U. S. 103, 109, recognized this guarantee of quiet possession of the United States to the Creek Nation (see supra, p. 13).

The *Nez Percé Tribe of Indians* v. *United States*, 95 C. Cls. 1, cited by the lower court in support of the above construction, has no application to the question before us for that case dealt with a right of occupancy title and not a fee simple title, and there was no solemn guaranty of quiet possession in the Nez Percé treaty, as is contained in the Creek and Seminole treaties. In the case at bar the United States, by solemn treaty obligation, guaranted the Creek and Seminole Nations quiet possession of their unceded national domain, and *in addition* protection from the hostilitites of other tribes. Furthermore, the intrusions in the Nez Percé case were not controlled by the United States.

In the case at bar the action of the railroad companies was directly supervised and controlled by the United States. Under Article 5 of the Treaty of June 14, 1866 only the railroads "which shall be duly authorized by Congress, and shall, with the express consent of the Secretary of the Interior," could construct said railroads through Creek country.

We submit that *The Pine Hill Co.* v. *United States*, 259 U. S. 191, 196, has no application to the question before us, for in that case the question was one involving the scope of the jurisdictional act, a question not now before the Court.

Therefore, the United States, by the treaty of 1866, having agreed to protect the petitioners in their property interests, and having guaranteed to its wards the quiet possession of their national domain, failed to protect the interests of petitioners in the lands unlawfully intruded upon by said railroad companies, and therefore became liable to petitioners for the value of said lands embraced within said "station reservations."

This court has held in *United States* v. *Creek Nation*, 295 U. S. 103, 110, that:

> "True, the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the disposals; but it was not in a position where it could be expected to assume that burden. It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests."

This Court has further defined the obligations of the United States, as guardian of the Indian tribes, in the recent case of *The Seminole Nation* v. *United States*, No. 348, October Term, 1941, decided May 11, 1942, 315 U. S. —, as follows:

> "Furthermore, this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and some-

times exploited people. E. g. The Cherokee Nation *v.* The State of Georgia, 5 Pet. 1; United States *v.* Kagama, 118 U. S. 375; Choctaw Nation *v.* United States, 119 U. S. 1; United States *v.* Pelican, 232 U. S. 442; United States *v.* Creek Nation, 295 U. S. 103; Tulee *v.* State of Washington, — U. S. —, No. 318 this Term. In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."

Therefore, in the light of the above expressions by this Court, we submit that the decision of the Court of Claims—holding that the United States has no obligation to protect the petitioner in its lands thus unlawfully intruded upon by said railroads, and that respondent owes no obligation to petitioner under the guarantee of quiet possesion as contained in the Treaty of 1866—is contrary to the applicable views of this Court on this question.

The third, fourth and fifth causes of action involve the rights of petitioner to the benefits prescribed by Congress in the Acts of February 28, 1902, c. 134, 34 Stat. 43, and April 26, 1906, c. 1876, 34 Stat. 137.

Section 15 of said Act of February 28, 1902, provides for the payment by the railroads of compensation to the Indian tribe for the lands taken for railroad purposes. The petition alleges that no such compensation was ever paid by said railroads.

Section 16 of said Act of February 28, 1902, provides that the railroads pay to the Secretary of the Interior, for the benefit of the tribe or nation through the lands of which the

railroad is constructed "an annual charge of fifteen dollars per mile for each mile of road constructed, the same to be paid so long as said lands shall be owned and occupied by such nation or tribe." The petition alleges that this annual charge has not been paid in full; that the Creek Nation owns and occupies the lands constituting said rights-of-way; and that respondent has neglected to collect said annual charge from the railroads, and has not accounted to petitioner for same.

The lower court further held that the procedure for compensation to the tribe as prescribed by the Act of February 28, 1902 would discharge any obligation of the railroads owing to the tribe under this act (Creek case, R. 19). The lower court failed to notice that the compensation therein provided was for the *right of user* in lands used for *necessary* railroad purposes; and also that the procedure applied to cases in which the amount of damages was in dispute. Clearly the procedure would not apply to a claim for the value of the fee simple title to petitioners' lands which were taken in violation of the act, and *never* used for railroad purposes. As heretofore stated, the essence of this case is the claim of the petitioners for the value of the lands included in said "station reservations", which the railroads unlawfully intruded upon; and which were never used for railroad purposes. The respondent, well knowing the facts, utterly failed in its duty to take steps to protect the interests of its wards, thus causing the loss of which we now complain.

It must also be remembered that the Act of February 28, 1902 was an arrangement made by the United States directly with the railroads. The Act affected the lands of petitioner, and provided certain benefits to be enforced for the benefit of petitioners. There is nothing in the act which would prevent the United States as the guardian of petitioners, from enforcing the provisions enacted for the bene-

fit of its dependent Indian wards. In fact, the act contemplated the supervision of the railroads by the United States. The railroads were required to file with the Secretary of the Interior maps of definite location, and these were required to be approved by him (Secs. 6, 15), and Section 16 thereof provided further that the annual charge of fifteen dollars per mile for each mile of road constructed be paid to the Secretary of the Interior for the benefit of the tribe. We submit that under these circumstances the act contemplated that the United States enforce for the benefit of petitioner the provisions of the act providing the benefits to petitioner for the lands taken thereunder for railroad purposes.

The petitioner further submits that the United States was required to enforce for the benefit of petitioner the provisions of the Act of April 26, 1906, c. 1876, 34 Stat. 137. We submit that the lower court erred in holding that the respondent was under no duty to act to protect the interests of its dependent Indian wards under this act.

Section 11 of said Act of April 26, 1906 required the Secretary of the Interior to collect all revenues of whatever character accruing to the petitioner. The lower court states that the allegations of the fourth cause of action would merely give rise to an action for trespass. Clearly the United States could have proceeded under this provision of law to collect the revenues arising out of the lands of petitioner thus unlawfully intruded upon by the railroad companies.

Section 18 of the Act of April 26, 1906, provided in part as follows:

> "That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the * * * Creek, or Seminole tribes * * * for the collection of any moneys or recovery of any land claimed by * * * said tribes."

Thus this act, by Sections 11 and 18, required not only that the Secretary of the Interior *shall* collect all revenues due the tribes, but also he was specifically authorized to bring suit to enforce said collections and to recover lands claimed by said tribes.

Although said Section 18 is permissive in form, yet we submit that it is mandatory in effect. In 25 R. C. L., p. 770, it is stated:

> "* * * Hence, permissive words used in statutes conferring power or authority upon public officers or bodies will be held to be mandatory where the act authorized to be done concerns the public interest or the rights of individuals. The word 'may' in statutes conferring powers upon public officers or official boards or tribunals may be so construed as to be the equivalent of 'shall' or 'must' where the public or individuals have an interest in the exercise of the powers conferred."

See also *Supervisors* v. *United States*, 4 Wall. 435; *French* v. *Edwards*, 13 Wall. 506; *Jaffray* v. *McGehee*, 107 U. S. 361.

Clearly this principle would apply with greater force when a fiduciary relationship exists between the parties.

We submit that the lower court erred in holding that said Section 18 was permissive and not mandatory in effect. Especially is this true when it is further considered that the Indian ward was unable to act on its own behalf, and its rights could be enforced only by action of the United States, its guardian.

The lower court criticizes our reference to *United States* v. *Creek Nation*, 295 U. S. 103, 109, and states that this case is not applicable to the question before us because that case was based upon facts which showed a direct liability on the part of the United States to its Indian ward. The failure of the United States to file suit under

this very Section 18 of the Act of 1906, was one of the elements considered by this Court in the Creek case in determining the liability of the United States in that case. This Court said in that case (295 U. S. 103, 110):

> "Plainly the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose. But, although having full knowledge of the facts, it made no effort in that direction."

In the Creek case this Court held that by the failure of the United States to act to protect the Creek Nation in the possession of its lands after a full knowledge of the facts, created a taking of said lands by the United States, and in that case this Court did not require an express promise by the United States that it would be liable for the failure to act to protect its Indian ward, before the liability of the United States would arise. Clearly the statement of the lower court—to the effect that there would have to be an express provision imposing liability if the Government fails to bring suit on behalf of its Indian ward (Creek case, R. 18)—is in error, as the law itself imposes liability on the guardian when it fails to act to protect the interests of its ward.

Clearly the United States could have filed suit to quiet title in the Creek Nation to lands embraced within said "station reservations", and therein demanded an accounting from the railroads for the rents and profits derived from the lands owned by petitioner. In the case of *United States, As Guardian of the Hualpai Tribe* v. *Santa Fe Pacific Railroad Company*, 314 U. S. 339, this Court held that the United States, as guardian of said Indian tribe, could demand of the railroad company an accounting for amounts received from lands leased by said railroad to third parties, with respect to the lands held by said tribe by immemorial possession.

In the case at bar the Creek Nation owned the fee simple title to the lands in question, and the railroad companies were granted merely a right of user to such lands only that were *necessary* for railroad purposes. The lands enclosed in said "station reservations" were never used for railroad purposes, and were not necessary for the operation of said railroads, but were leased by them to third parties, and the income derived therefrom went into the coffers of the railroad companies. These facts were known to the United States, and although having the duty to act on behalf of its Indian ward, and having the power to demand an accounting of the railroads for said rents and profits, as is evidenced by the holding in the Hualpai case, and being under a further duty to act to protect the interests of petitioner under the provisions of the treaty of 1866, yet respondent did nothing to protect the interests of its Indian ward.

We are not forced to rely upon a violation of the plain provisions of Article V of the Treaty of 1866 alone. By Article X of the same treaty, the Creeks agreed that Congress may pass such legislation as it deems necessary for their protection. By Section 18 of the Act of April 26, 1906, the Secretary of the Interior was authorized to bring suit in the name of the United States for the recovery of the possession of these lands. By Section 27 of the same act, these lands are held in trust by the United States for us. We claim the protection of this act, and contend that such protection was withheld from us. Our causes of action, therefore, are founded upon liabilities assumed by the defendant under positive treaties and statutes.

Thus the respondent, under the Treaty of 1866, took upon itself the duty of handling this matter for petitioner; under the rights granted to it to pass legislation for our benefit, it has seen fit to take away from us the right for us to bring suit to recover the possession of these lands our-

selves; under the Act of April 26, 1906 it has seen fit to assume that duty itself; and respondent has done nothing.

Furthermore, R. S. 2114; Title 25, Sec. 174, p. 1007, U. S. Code (from Act of May 28, 1830, c. 148, 4 Stat. 411, 412), which applied to petitioners, provides:

> "The President is authorized to exercise general superintendence and care over any tribe or nation which was removed upon an exchange of territory under authority of the act of May 28, 1830, 'to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi'; and to cause such tribe or nation to be protected, at their new residence, against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever."

We submit that under the applicable decisions of this Court the United States is liable for its failure to perform its plain treaty and statutory duties to its dependent Indian wards.

Conclusion.

For the reasons set forth above we respectfully request that this Court grant writs of certiorari to the petitioners in these cases.

Respectfully submitted,

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Attorneys for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 321

THE CREEK NATION,

Petitioner,

vs.

THE UNITED STATES.

No. 322

THE SEMINOLE NATION,

Petitioner,

vs.

THE UNITED STATES.

BRIEF OF PETITIONERS

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

PAUL M. NIEBELL,
C. MAURICE WEIDEMEYER,
W. W. PRYOR,
Counsel for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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THE UNITED STATES.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF OF PETITIONERS.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Creek and Seminole Nations of Indians, petitioners herein, respectfully present the following data for the consideration of the Court upon the review of these cases:

Opinion Below.

The opinion of the Court of Claims is not as yet reported (Creek case, R. 12-21).

Jurisdiction.

The judgment of the Court of Claims was entered on June 1, 1942 in both the Creek and Seminole cases (Creek case, R. 21; Seminole case, R. 11-13). The petition for writs of certiorari was filed on August 21, 1942, and was granted on October 19, 1942 (Creek case, R. 21; Seminole case, R. 12). The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (Sec. 288 of the Judicial Code, as amended, 28 U. S. C. A. 129).

Statutes Involved.

The special jurisdictional act approved May 24, 1924, c. 181, 43 Stat. 139, reads in part as follows:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States. * * *"

The special jurisdictional act of the Seminole Nation was approved May 20, 1924, c. 162, 43 Stat. 133, and is substantially the same as the above act of the Creek Nation.

The Act of August 16, 1937, c. 651, 50 Stat. 650, provides in part as follows:

> "That in suits heretofore filed in the United States Court of Claims by the Five Civilized Tribes under their respective Jurisdictional Acts * * * plaintiffs therein shall have the right, prior to January 1, 1938, to amend their petitions to conform to any evidence heretofore filed in said suits, whether such amended petitions develop original claims or present new claims based upon said evidence; and jurisdiction be, and is hereby, conferred upon said Court of Claims, not-

withstanding the lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which may have been presented by said Indian Nations in any amended petitions heretofore filed, or which may be filed under the terms of this Act; and claims so presented shall be adjudicated by said court upon their merits as though presented by petition filed within the time limited by said respective original Jurisdictional Acts, as amended; * * *".

The Treaty of June 14, 1866; 14 Stat. 785-788, between the Creek Nation and the United States provides in part as follows:

"Article I. * * * They also agree to remain at peace with all other Indian tribes; and, in return, the United States guarantees them quiet possession of their country, and protection against hostilities on the part of other tribes. * * *"

* * * * * * *

"Article V. The Creek Nation hereby grant a right of way through their lands, to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south of the Creek country, and likewise from any point on their eastern to their western or southern boundary, but said railroad company, together with all its agents and employees, shall be subject to the laws of the United States relating to intercourse with Indian tribes, and also to such rules and regulations as may be prescribed by the Secretary of the Interior for that purpose, * * *".

* * * * * * * * *

"Article X. The Creeks agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian territory: * * *"

Articles I, V and VII of the Treaty of March 21, 1866, 14 Stat. 755, 756-758, between the Seminole Nation and the United States, contain substantially the same provisions as those of the Creek treaty above quoted.

The Act of February 28, 1902, c. 134, 32 Stat. 43, 47, 48, provides in part as follows:

> "Sec. 15. That before any railroad shall be constructed or any lands taken or condemned for any of the purposes set forth in the preceding section, full compensation for such right of way and all land taken and all damage done or to be done by the construction of the railroad, or the taking of any lands for railroad purposes, shall be made to the individual owner, occupant, or allottee of such lands, and to the tribe or nation through or in which the same is situated; * * * "
>
> "Sec. 16. That where a railroad is constructed under the provisions of this Act there shall be paid by the railway company to the Secretary of the Interior, for the benefit of the particular tribe or nation through whose lands any such railroad may be constructed, an annual charge of fifteen dollars per mile for each mile of road constructed, the same to be paid so long as said lands shall be owned and occupied by such nation or tribe, which payment shall be in addition to the compensation otherwise provided herein; * * *"

The Act of April 26, 1906, c. 1876, 34 Stat. 137, 141, 144, provides in part as follows:

> "Sec. 11. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him;"
>
> * * * * * * * *
>
> "Sec. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the * * * Creek, or

Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the tribal governments, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits:"

Questions Presented.

The questions presented are as follows:

1. Whether the United States, as guardian of the Creek and Seminole Nations, can knowingly permit railroad companies to fence up and segregate from the lands of said tribes what are known as "station reservations" which were never used for railroad purposes, and thus permit unlawful intrusions upon the lands owned by said tribes in fee simple, and then fail and refuse to act to protect the interests of said tribes, without becoming liable for the resulting loss occasioned to its Indian wards.

2. Whether the United States is liable to the Creek and Seminole Nations for its failure to enforce against said railroad companies on behalf of said tribes the guarantee of quiet possession to lands of their national domain intruded upon by said railroad companies, which guarantee is contained in the treaties with said Indian tribes.

3. Whether or not the United States is liable to the Creek and Seminole Nations for its failure to collect for the benefit of the tribes the rents and profits derived by said railroads from the lands of petitioners, thus unlawfully intruded upon and held by said railroad companies.

4. Whether the United States, as guardian of said tribes, is liable to them for its failure to enforce against said railroad companies for the benefit of said tribes the provisions of statutes passed for their benefit.

5. Whether the United States, as guardian of petitioners, is liable for its failure to enforce against said railroad companies the provisions of the Act of February 28, 1902, c. 134, 32 Stat. 43, prescribing benefits for petitioners.

6. Whether the Act of April 26, 1906, c. 1876, 34 Stat. 137, is mandatory in effect, requiring the United States, as guardian, to act to protect the property interests of its Indian wards.

Statement.

These cases involve the same issues and came before the lower court on demurrer to the amended petitions filed by petitioners. As the Creek and Seminole treaties of 1866 are substantially the same, and the subsequent statutes involved apply to the Creek and Seminole Nations alike, the decision of the lower court in the Creek case applies equally to the Seminole case. To simplify our discussion we have confined it largely to the Creek case and request that the Court consider it as applicable equally to the Seminole case.

The petitions embody five causes of action, the facts of which are admitted by the demurrer. We outline the facts briefly as follows:

First Cause of Action.

The Creek Nation owned its national domain in fee simple (Treaty of February 14, 1833, Arts. 2, 3; 7 Stat. 417, 418-419).

By Treaty of June 14, 1866, 14 Stat. 785, 786 (Art. 3) the Creek Nation ceded to the United States one half of its entire domain, and retained the eastern half as its permanent national domain. By Article 5 of said treaty the Creek Nation granted a right of way to two railroads duly authorized by Congress, and with the express consent and approbation of the Secretary of the Interior, to construct railroads through the Creek national domain. Article 1

provided that the United States guarantee to the Creek Nation quiet possession of the lands not granted in said treaty.

The two treaty railroads constructed lines through the Creek domain under the provisions of said treaty of 1866. However, in addition to the right-of-way granted by the treaty, respondent permitted said railroads to intrude upon and fence up various twenty acre tracts at points along said rights-of-way, which were called "station reservations" These "station reservations" were not essential to the operation of said railroads, and were never used for railroad purposes, but have been leased and rented by said railroad companies to third parties for purposes other than for railroad purposes, and said lands have provided a considerable source of revenue to said railroads from the lands owned by petitioner.

These violations of the treaty by said railroad companies were well known to respondent, but it permitted them to continue to exist; and although the respondent was in duty bound to supervise the action of said railroads under said Article 5, and to enforce for the benefit of petitioner the guarantee of quiet possession contained in Article 1 of said treaty, yet respondent took no steps to put petitioner in possession of its lands, and thus petitioner has been deprived of the use and possession of same, and the rents and profits derived by said railroads therefrom. And because of said failures of respondent to comply with said treaty, petitioner contends that respondent is liable for the loss thus occasioned to petitioner (Creek case, R. 2-5; Seminole case, R. 2-4):

Second Cause of Action.

The second cause of action is similar to the first cause of action, except that the authority of said railroad companies to construct lines through the Creek national domain was not derived from the Treaty of June 14, 1866, but arose out of the provisions of the Act of February 28, 1902, c. 134, 32

Stat. 43. Under this act various other railroads were authorized to construct lines through the Creek national domain; under the conditions prescribed in said act.

The respondent permitted these railroads also to intrude upon the fenced up "station reservations" in addition to the lands taken for the rights of way, as did the two treaty railroads. These "station reservations" were not necessary for the operation of said railroads, and were never used for railroad purposes, but were leased and rented out by said railroad companies to third parties for purposes other than for railroad purposes, which have provided a considerable source of revenue to said railroad companies from the lands owned by petitioner.

These conditions were well known to respondent, but it permitted them to continue to exist; and although the respondent was in duty bound to supervise the action of said railroads under said Act of February 28, 1902, to enforce the provisions of said act for the benefit of petitioner, and to enforce for the benefit of petitioner, the guarantee of quiet possession contained in the Treaty of June 14, 1866, yet respondent took no steps to put petitioner in possession of its lands, and thus petitioner has been deprived of the use and possession of same, and the rents and profits derived by said railroads therefrom. And because of said failures of respondent to comply with said treaty and to enforce said Act of February 28, 1902, petitioner contends that respondent is liable for the loss occasioned to petitioner (Creek case, R. 5-7; Seminole case, R. 5-6).

Third Cause of Action.

The third cause of action sets forth the failure of respondent to enforce Sections 15 and 16 of the Act of February 28, 1902 against said railroads for the benefit of petitioner.

Under Section 15 of said act the railroads were required to pay to the tribe compensation for the lands taken for

railroad purposes. It is alleged and admitted on demurrer that no such compensation was paid petitioner under the provisions of said Section 15.

Under Section 16 of said act the railroads were required to pay to the Secretary of the Interior for the benefit of the tribes an annual charge of fifteen dollars per mile for each mile of road constructed, to be paid as long as said lands shall be owned and occupied by said tribes. It is alleged and admitted on demurrer that petitioner owns and occupies said lands but that the respondent has failed to collect this annual charge for the benefit of petitioner under said Section 16, and that respondent is liable to petitioner for such failure (Creek case, R. 7-9; Seminole case, R. 6-8).

Fourth Cause of Action.

The fourth cause of action sets forth the failure of respondent to comply with Section 11 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 141. Under this provision the Secretary of the Interior was directed to collect *all* revenues of whatever character accruing to said Indian tribes. However, respondent failed to collect the rents and profits derived from the lands of petitioner wrongfully intruded upon by said railroad companies, and for said failure the petitioner contends that respondent is liable for the amount of which it was so deprived (Creek case, R. 9; Seminole case, R. 8).

Fifth Cause of Action.

The fifth cause of action embodies all of the allegations of the four preceding causes, and simply stated, alleges that under Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, the Secretary of the Interior was authorized to bring suit for the collection of any moneys or for the recovery of any land claimed by these tribes. Although well knowing of the intrusions by the railroads upon the lands of petitioner, yet respondent failed to act on behalf of petitioner to recover the lands, or the profits derived

therefrom. Thus petitioner has been deprived of the benefits of said Section 18, and petitioner contends that respondent is liable for the loss occasioned to it (Creek case, R. 10-11; Seminole case, R. 9-10).

The petition further alleges that petitioner had no means of recovering in its own name the lands thus intruded upon, or to collect the moneys from said railroad companies, except through the action of the United States (Creek case, R. 11; Seminole case, R. 10).

The petition prays that judgment be entered against respondent for the full present value of the lands embraced in said station reservations thus unlawfully intruded upon by said railroad companies, which respondent failed and refused to restore to petitioner after a full knowledge of the facts; that respondent be required to account to petitioner for the amounts respondent failed to collect for the benefit of petitioner under Sections 15 and 16 of said Act of February 28, 1902, and for the rents and profits from petitioner's lands thus unlawfully intruded upon, which respondent permitted said railroad companies to divert into their own coffers (Creek case, R. 11; Seminole case, R. 10).

The lower court dismissed the petition, holding in effect, that respondent was not liable for its failure to enforce the guarantee of quiet possession contained in said Treaty of June 14, 1866; that respondent, as guardian of petitioner, owed petitioner no duty to act to protect the interests of its Indian wards from the inroads of said railroad companies, even though it was required to supervise the action of said railroads under the provisions of said treaty, and had a full knowledge of the facts; and, further, that respondent was not required under the Acts of February 28, 1902 and April 26, 1906 to enforce the benefits accruing to petitioner under the provisions of said acts, even though the petitioner was unable to act on its own behalf to protect its property interests, but was required to rely upon the action of the United States, its guardian (Creek case, R. 10-11; Seminole case, R. 9-10).

The petitioner believes that the lower court erred in this holding, and contends generally that the respondent, as guardian of petitioner, was required to take affirmative action to protect the petitioner in the possession of its lands, and to protect petitioner in this case against the inroads of said railroad companies, and to enforce the provisions of the Treaty of 1866 on behalf of petitioner, after respondent had a knowledge of the facts, and when it was known to respondent that said railroads were intruding upon lands owned by petitioner and were not using them for railroad purposes. Also that respondent is liable to its ward for the failure to enforce against said railroad companies statutes passed for the benefit of petitioner.

Specification of Errors to Be Urged.

The court below erred:

1. In holding that the United States, as guardian of petitioner, is not required to act to protect the lands of petitioner from unlawful intrusion by railroad companies authorized to construct lines of railroad through the lands of petitioner, after respondent had a full knowledge of said intrusions, and when it by solemn treaty stipulation guaranteed to petitioner quiet possession of its national domain.

2. In holding that the guarantee of quiet possession by the United States to the Creek Nation in the Treaty of June 14, 1866, 14 Stat. 785, does not require the respondent to act to protect petitioner in the quiet possession of its lands, when respondent knew of intrusions by said railroad companies.

3. In holding that the United States, as guardian of petitioner, was under no duty to act to protect the petitioner in the receipt of the benefits prescribed by the Act of February 28, 1902, even thought that act required the Secretary of the Interior to collect certain of the revenues due said Indian nation from said railroad companies.

4. In holding that the procedure prescribed by said Act of February 28, 1902, for the ascertainment of damages to the Indian tribes for the right of user to lands necessarily taken for railroad purposes, provided a full and complete means for compensating said tribes for the value of the fee simple title to the lands of petitioner unlawfully intruded upon by said railroads, which lands were *never* used for railroad purposes.

5. In holding that the United States was not required to act under Section 11 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 141, to collect all revenue due petitioners from all sources, including the income derived by said railroad companies from the lands of petitioner thus unlawfully intruded upon, and leased by said railroads to third parties for commercial purposes.

6. In holding that the United States, as guardian of petitioner, was not in duty bound to file suit to recover from said railroad companies the lands of petitioner thus unlawfully intruded upon, and to recover the amounts received by said railroads from leases of said lands of petitioner, when respondent knew that petitioner was unable to proceed in its own behalf to protect its property interests, but was required to rely upon the action of the respondent for the needed protection of its interests.

7. In holding that said Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 144, is permissive and not mandatory in effect.

8. In holding that the respondent, as guardian of petitioner, is not liable to its ward when respondent ties the hands of its ward so that it cannot take legal steps of its own to protect its property interests, and respondent then itself fails and refuses to act to protect the property interests of its ward after it has assumed that duty.

Summary of Argument.

The argument on behalf of petitioners may be summarized as follows:

The petitioners contend generally that the United States, as guardian of the Creek and Seminole Nations, was in duty bound to enforce for the benefit of these dependent Indian wards, the provisions of treaties between the United States and said nations, and Acts of Congress defining the rights of railroad companies constructing roads through the domain of said Indian nations, and prescribing protection and other benefits for petitioners; and that if the United States fails in this duty it is liable to said Indian wards for any losses occasioned to the trust estates.

In developing this issue we discuss the provisions of the Treaties of 1866 between the petitioners and respondent, in which the United States expressly guaranteed to these Indian nations the quiet possession of the lands retained by them as their permanent national domains; and also the provisions granting lands to railroads for *necessary* railroad purposes and constructing railroads through the lands of petitioners under the supervision of the United States.

We discuss also the Act of February 28, 1902, c. 134, 32 Stat. 43, under which railroads generally were granted lands of petitioners for *necessary* railroad purposes, under conditions prescribed in said act.

The first and second causes of action present claims for the violations of said Treaties of 1866 and the Act of February 28, 1902. The facts show that respondent permitted the railroads to intrude upon the lands of petitioners and fence up certain tracts for what are known as "station reservations," which were never used for railroad purposes, but which have been rented out and leased by said railroads for commercial purposes, and that the income from these lands of petitioners was retained by said railroads. That the United States, having knowledge of the facts, failed to enforce for the benefit of petitioners the protection due

them under treaty and statutes, and also failed to enforce the guarantee of quiet possession contained in said treaties of 1866, and therefore is liable for the value of the lands and the income therefrom of which petitioners have been deprived.

We further discuss the decisions of this Court in United States v. Creek Nation, 295 U. S. 103, and Seminole Nation v. United States, 315 U. S. —, and other decisions setting forth the views of this Court and holding that these dependent Indian wards were entitled to rely upon the United States, their guardian, for the needed protection of their interests, and that the United States is liable to the tribes for its failure to act to protect the trust estates from loss.

With respect to the third, fourth and fifth causes of action we discuss the particular benefits prescribed by Congress for petitioners under the Acts of February 28, 1902, and the Act of April 26, 1906, c. 1876, 34 Stat. 137, and the duty of the United States to enforce these benefits for these Indian wards.

We contend that the duty of the United States, as guardian of these dependent Indian wards, does not end with the enactment of the statutes prescribing these benefits, but that it was the duty of the United States to enforce for the benefit of its wards the protection and benefits prescribed by said statutes.

With respect to Section 18 of the Act of April 26, 1906, we contend that the United States was required to file suits to recover any lands claimed by these Indian nations, or for the collection of any moneys due them; that this act was mandatory in effect, and required affirmative action on the part of the guardian in the interests of its wards; that it required the United States to file suits for the recovery of the lands within said "station reservations" which were never used for railroad purposes, and for the recovery of the profits derived by said railroads from the lands of petitioners.

We further point out that the petitioners, being under guardianship, were not able to act in their own behalf, but were required to rely upon the action of the United States; that under said Act of April 26, 1906 the United States assumed the duty of acting on behalf of petitioners, but then did nothing to enforce the rights of petitioners neither with respect to their lands nor the income therefrom of which they have been thus deprived. We contend that under these circumstances the respondent is liable to petitioners for the resulting losses to the trust estates.

Argument.

This Court has granted certiorari to review the decision of the Court of Claims on the demurrers to the petitions, dismissing the petitions in the two cases now consolidated for review by this Court.

The main question before the Court on the review of these cases is whether the United States, as guardian of the Creek and Seminole Nations of Indians, is in duty bound to enforce for the benefit of petitioners the provisions of treaties between petitioners and respondent, and other Acts of Congress regulating the rights of railroad companies constructing railroads through the domains of said nations. In other words, whether respondent as guardian of petitioners, is in duty bound to enforce against third parties for the benefit of petitioners the provisions of said treaties and Acts of Congress prescribing protection and benefits for petitioners.

It is the contention of petitioners that it was the duty of the United States, as guardian of these Indian tribes, to protect them from the unauthorized intrusions of railroads upon the lands of these nations, and also to enforce on behalf of petitioners the protection and benefits guaranteed to and prescribed for them in said treaties and Acts of Congress.

The issues involve the provisions of the treaties of March 21, 1866, 14 Stat. 755, and June 14, 1866, 14 Stat.

785; between the Seminole and Creek Nations, respectively, and the United States, and the Acts of February 28, 1902, c. 134, 32 Stat. 43, and April 26, 1906, c. 1876, 34 Stat. 137. We will discuss below these provisions and their relation to the issues herein presented.

The Creek and Seminole Nations owned their national domains in fee simple.

Both the Creek and Seminole Nations owned their national domains in fee simple, and the lands thus held by them are involved in these proceedings.

The Creek Nation acquired said national domain under the provisions of the Treaty of February 14, 1833, Articles 2 and 3, 7 Stat. 417, 418-419. By Treaty of June 14, 1866, 14 Stat. 785, 786 (Art. 3), the Creek Nation ceded to the United States the western half of its entire domain, and reserved the eastern half as its permanent national domain, and Article 1 provided in part that "the United States guarantees them quiet possession of their country, and protection against hostilities on the part of other tribes." *

In reviewing the title of the Creek Nation this Court, in United States v. Creek Nation, 295 U. S. 103, 109, said:

> "The Creek tribe had a fee simple title, not the usual Indian right of occupancy with the fee in the United States. That title was acquired and held under treaties, in one of which the United States guaranteed to the tribe quiet possesion. The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government."

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* The Seminole treaty of March 21, 1866, 14 Stat. 755, 756, contains the grant of the United States to the Seminole Nation of its national domain, and also the guarantee of quiet possession similar to that set forth in the Creek treaty.

The Two Treaty Railroads.

Article 5 of said treaty of June 14, 1866 provides in part as follows:

> "The Creek Nation hereby grant a right of way through their lands, to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south of the Creek country, and likewise from any point on their eastern to their western or southern boundary. * * *"

Thus by said Article 5 two railroads were granted *rights-of-way* through the Creek national domain. Really, in effect, the Creek Nation granted to the United States the right-of-way for two railroads, which the United States would in the future authorize to construct railroads through the Creek Nation. The width of the right-of-way was not specified, but was left to the discretion of respondent.

Pursuant to said Article 5, the Act of July 26, 1866, c. 270, 14 Stat. 289, authorized the Union Pacific Railroad Company (now the Missouri, Kansas and Texas Railroad), to construct a railroad through Indian Territory; and by Act of July 27, 1866, c. 278, 14 Stat. 292, the Atlantic and Pacific Railroad Company (now the Saint Louis and San Francisco Railroad), was authorized to construct a railroad through the Indian Territory. Both of said acts granted a right-of-way of 200 feet in width, and also "all *necessary* grounds for stations," etc.

Congress authorized railroads generally to construct railroads through Indian Territory by Act of February 28, 1902.

The statement of the lower court that the Act of February 28, 1902, c. 134, 32 Stat. 43, was passed pursuant to the Treaty of June 14, 1866 (Creek case, R. 15) is clearly

in error, for we have seen that just two railroads were granted rights-of-way under this treaty, and the acts of Congress passed pursuant thereto. However, by the Act of February 28, 1902, Congress authorized railroads generally to acquire lands for rights-of-way and for other *necessary* railroad purposes, and to construct railroads through Indian Territory under the conditions prescribed by said act.

The railroads intruded upon the lands of petitioners and staked out "station reservations" not necessary for railroad purposes.

Rights-of-way of 200 feet in width were taken by the railroads constructing railroads through the lands of petitioners. Experience over a long period of years has shown that these rights-of-way through a level, prairie country were sufficient for station grounds, etc. However, in addition to these rights-of-way, said railroads—dealing entirely with respondent and not with petitioners—fenced up and intruded upon various tracts of petitioners' lands known as "station reservations," each containing approximately 20 acres. These "station reservations" were not necessary for railroad purposes, and have never been used for railroad purposes, but have been leased and rented by said railroads to third parties for purposes wholly unconnected with the operation and maintenance of said railroads, and the rents and profits from the lands of petitioners have been going into the coffers of said railroads, with the acquiescence of respondent.

Let us say to the Court that the treaty of 1866 by implication grants *necessary* station reservations, along with the right-of-way, and in this respect the treaty and the statutes above referred to are similar to each other—they grant station grounds if *necessary*. However, neither the treaty nor any act of Congress warrants the intrusions herein complained of.

The gravamen of our complaint is that while the railroads did acquire rights-of-way either by treaty or statute,

neither the treaty nor any statute gave these 20 acre "reservations," which were *not necessary* to the enjoyment of the right-of-way, and upon which the railroads *simply intruded*.

The First and Second Causes of Action.

The first and second causes of action present a claim for the value of the lands of petitioners included within said "station reservations," which were not necessary for railroad purposes and were never so used, and which respondent permitted said railroads to fence up and retain in violation of the Treaties of 1866 and the Act of February 28, 1902.

The demurrer of respondent (defendant below) admits:

1. That under the treaties of 1866 it was the duty of the respondent to supervise the grants of lands of petitioners to railroads under said treaties and the Act of February 28, 1902, and to protect petitioners in the quiet possession of the lands not so granted.

2. That the fencing up of said "station reservations" by said railroads were unauthorized and unlawful intrusions upon the lands of petitioners, and were permitted by respondent in violation of said treaties of 1866 and of the Act of February 28, 1902.

3. That said "station reservations" were not necessary to the operation of said railroads and were never used for railroad purposes, but have been rented and leased by said railroads for purposes unconnected with the operation of said railroads, and that the railroads were thus deriving a profit from the lands belonging to petitioners, which were not granted to said railroads by the Treaties of 1866 or the Act of February 28, 1902.

4. That said intrusions were well known to respondent, but that it has failed and refused to put petitioners in possession of said lands.

5. That petitioners have no means of recovering in its own name said "station reservations," but must rely upon the action of the United States.

The United States, as guardian of petitioners, knew of these violations of the Treaties of 1866 and the Act of February 28, 1902, and of the unlawful intrusions by the railroad companies upon the lands of petitioners, yet permitted these conditions to exist, and petitioners now contend that the respondent is liable for the value of said lands thus lost to petitioners because of the failure of respondent to enforce the protection guaranteed by it in the Treaty of 1866.

With respect to the first and second causes of action the lower court states (Creek case, R. 16):

> "A fatal defect of the first two counts is the failure to show or allege any agreement or promise which would make the defendant liable for the action of third parties, which was held in effect to be necessary in the case of the Choctaw and Chickasaw Nations, supra."

The petition in the *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494, was defective in that, as the lower court pointed out (p. 498):

> "No treaty or act of Congress is cited wherein the Government assumed liabilities of the character claimed in positive language * * * "

And after reviewing the provisions of the Act of 1902, the lower court further stated (p. 501) that there is "no provision of the act imposing liability upon the Government as herein claimed."

We drew our amended petitions with the Choctaw and Chickasaw case decision before us, and cited the treaties and acts of Congress under which we claimed the benefits. In this case we make no claim except for the protection guaranteed us by treaty and by statutes passed for our benefit. The distinction between the Choctaw and Chickasaw case and the case at bar was recognized by the lower

court when it reinstated our case after the decision of the Choctaw and Chickasaw case (Creek case, R. 2). Clearly the decision in the Choctaw and Chickasaw case has no application to the case at bar.

Furthermore, the Choctaw case was decided (June 6, 1932) before the passage of the Act of August 16, 1937, c. 651, 50 Stat. 650, giving the Court of Claims power to adjudicate "any and all legal and equitable claims" of said Indian nations, thus making it unnecessary that the claims presented by amended petition arise and grow out of treaties and Acts of Congress.

By treaties of 1866 the Respondent guaranteed Petitioners quiet possession of their lands.

We submit that the lower court erred in placing too narrow a construction on the guarantee of quiet possession made by the United States to the petitioners in said treaties of 1866. The lower court said (Creek case, R. 16):

> "We think this guarantee of quiet possession referred to hostilities on the part of other tribes and not to encroachments by railroads which are not alleged to have done anything against the will of the plaintiff."

A mere glance at the Treaty of June 14, 1866 (Art. 1), shows that this construction is not justified. The treaty states:

> "the United States guarantees them quiet possession of their country, and protection against hostilities on the part of other tribes. * * *"

Thus the treaty not only guarantees the Creek Nation quiet possession of their domain, but also protection against hostilities of other tribes.

While it is true that the guarantee of quiet possession does not apply to the rights-of-way granted to the railroads as the lower court points out (Creek case, R. 16),

yet this guarantee does apply to the lands intruded upon by the railroad companies which were never used for *necessary* railroad purposes.

As we have heretofore seen, this Court in the Creek case, 295 U. S. 103, 109, recognized this guarantee of quiet possession of the United States to the Creek Nation (see supra, p. 16).

The *Nez Perce Tribe of Indians* v. *United States*, 95 C. Cls. 1, cited by the lower court in support of the above construction, has no application to the question before us for that case dealt with a right of occupancy title and not a fee simple title, and there was no solemn guaranty of quiet possession in the Nez Perce treaty, as is contained in the Creek and Seminole treaties. In the case at bar the United States, by solemn treaty obligation, guaranteed the Creek and Seminole Nations quiet possession of their unceded national domain, and *in addition* protection from the hostilities of other tribes. Furthermore, the intrusions in the Nez Perce case were not controlled by the United States. In the cases at bar the action of the railroad companies was directly supervised and controlled by the United States. Under Article 5 of the Treaty of June 14, 1866 only the railroads "which shall be duly authorized by Congress, and shall, with the express consent of the Secretary of the Interior," could construct said railroads through Creek country.

We submit that *The Pine Hill Co. v. United States*, 259 U. S. 191, 196, has no application to the question before us, for in that case the claims presented did not come within the scope of the jurisdictional act; and it did not involve a guardian and ward relationship.

Therefore, the United States, by treaty of 1866, having agreed to protect the petitioners in their property interests, and having guaranteed to its wards the quiet possession of their national domain, failed to protect the interests of petitioners in the lands unlawfully intruded upon by said railroad companies, and therefore became liable to

petitioners for the value of said lands embraced within said "station reservations."

This court has held in *United States* v. *Creek Nation*, 295 U. S. 103, 110, that:

> "True, the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the disposals; but it was not in a position where it could be expected to assume that burden. It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests."

This Court has further defined the obligations of the United States, as guardian of the Indian tribes, in the recent case of *The Seminole Nation* v. *United States*, No. 348, October Term, 1941, decided May 11, 1942, 315 U. S. —, as follows:

> "Furthermore, this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. E. g. The Cherokee Nation *v.* The State of Georgia, 5 Pet. 1; United States *v.* Kagama, 118 U. S. 375; Choctaw Nation *v.* United States, 119 U. S. 1; United States *v.* Pelican, 232 U. S. 442; United States *v.* Creek Nation, 295 U. S. 103; Tulee *v.* State of Washington,—U. S.—, No. 318 this Term. In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."

Therefore, in the light of the above expressions by this Court, we submit that the decision of the Court of Claims—holding that the United States has no obligation to protect

the petitioners in their lands thus unlawfully intruded upon by said railroads, and that respondent owes no obligation to petitioners under the guarantee of quiet possession as contained in the Treaty of 1866—is contrary to the applicable views of this Court on this question.

The Third, Fourth and Fifth Causes of Action.

The third, fourth and fifth causes of action involve the rights of petitioners to the benefits prescribed by Congress in the Acts of February 28, 1902, c. 134, 34 Stat. 43, and April 26, 1906, c. 1876, 34 Stat. 137, which respondent failed and refused to enforce on behalf of petitioners.

Duties of Respondent under the Act of February 28, 1902.

The third cause of action is based upon the failure of the respondent to collect for the benefit of petitioners the compensation provided in Sections 15 and 16 of the Act of February 28, 1902.

Section 15 of said Act of February 28, 1902, provides for the payment by the railroads of compensation to the Indian tribes for the lands taken for necessary railroad purposes. The petition alleges and the demurrer admits that no such compensation was ever paid by said railroads.

Section 16 of said Act of February 28, 1902, provided that the railroads pay to the Secretary of the Interior for the benefit of the tribe or nation through the lands of which the railroads are constructed—

> "an annual charge of fifteen dollars per mile for each mile of road constructed, the same to be paid so long as said lands shall be owned and occupied by such nation or tribe, which payment shall be in addition to the compensation otherwise provided herein."

The petition alleges and the demurrer admits that this annual charge has not been paid in full; that the petitioners own and occupy the lands constituting said rights-of-way;

that respondent has neglected to collect said annual charge from the railroads, and has not accounted to petitioners for same.

The lower court further held that the duty of the United States was wholly discharged by the mere enactment of said Act of February 28, 1902 disposing of petitioners' lands to the railroads, and prescribing the procedure for the determination of the compensation to be paid by said railroads to the Indian nations, and that the United States, as guardian, owed no duty to protect the interests of its Indian wards from the violations of said act by said railroad companies (Creek case R. 19-20). In other words, the lower court held that by the mere enactment of the statute disposing of its wards' lands it could then wash its hands of the whole matter—this holding notwithstanding the fact that respondent had full administrative control over the property and affairs of these tribes (*Cherokee Nation* v. *Hitchcock*, 187 U. S. 294).

We submit that this holding is contrary to the decisions of this Court referred to supra, p. 23.

The lower court failed to notice that the compensation thus provided for in the Act of February 28, 1902 was for the right of user in lands *properly* taken for *necessary* railroad purposes; and also that the procedure therein provided applied to cases in which the amount of damages was in dispute. Also this provision would apply principally to the claim for compensation under Section 15 of said act, which is embodied in the third cause of action; it would not apply to the claim of petitioners for the additional compensation due under said Section 16 wherein the railroads were directed to pay to the Secretary of the Interior the annual charge of fifteen dollars per mile for each mile of road constructed.

Clearly the procedure prescribed by the act of 1902 would not apply to a claim for the value of the fee simple title to petitioners' lands included in the "station reservations" and *never* used for railroad purposes, which is the subject

matter of the first, second and fifth causes of action. As heretofore stated, the essence of the case in the main is the claim of the petitioners for the value of the lands included in said "station reservations," which the railroads unlawfully intruded upon, and which were never used for railroad purposes. The respondent, well knowing the facts, utterly failed in its duty to take steps to protect the interests of its Indian wards, thus causing the loss of which petitioners now complain.

It is also to be remembered that the Act of February 28, 1902 was an arrangement made by the United States directly with the railroads. The Act affected the lands of petitioners, and provided certain benefits to be enforced for the benefit of petitioners. There is nothing in the act which would prevent the United States, as the guardian of petitioners, from enforcing the provisions enacted for the benefit of its dependent Indian wards. In fact, the act contemplated the supervision of the railroads by the United States. The railroads were required to file with the Secretary of the Interior maps of definite location, and these were required to be approved by him (Secs. 6, 15); employees of the railroads necessary for the construction and management of the railroads were authorized to reside on the rights-of-way under rules and regulations established by the Secretary of the Interior (Sec. 7); all mortgages executed by the railroads were required to be recorded in the Department of the Interior (Secs. 11, 20); and the railroads were required to pay to the Secretary of the Interior for the benefit of the tribes fifty dollars for each mile of road constructed (Sec. 5), compensation and damages for necessary lands taken (Sec. 15), and in addition, the railroads were required to pay to the Secretary of the Interior for the benefit of the tribes an annual charge of fifteen dollars per mile for each mile of road constructed (Sec 16).

We submit that under these circumstances the act contemplated that the United States enforce for the benefit of petitioners the provisions of the act providing benefits

to petitioners for the lands taken thereunder for necessary railroad purposes. Certainly the imposition of these requirements by the United States upon the railroads for the benefit of petitioners, would imply the power in the United States, as guardian of these dependent Indian nations, to enforce them (*Heckman* v. *United States*, 224 U. S. 413, 438).

In the Heckman case, under authority of an Act of Congress, the United States brought various suits in equity against third parties to cancel conveyances of allotted lands upon the ground that the conveyances were made in violation of existing restrictions upon the power of alienation contained in the agreements between the United States and the Indians of the Five Civilized Tribes and under Acts of Congress. A demurrer was filed questioning the right of the United States to maintain said suits. This Court concluded that the suits were well brought, and further stated (pp. 437, 438):

> "During the continuance of this guardianship, the right and duty of the Nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid. While relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States. A review of its dealings with the tribe permits no other conclusion. Out of its peculiar relation to these dependent peoples sprang obligations to the fulfillment of which the national honor has been committed. 'From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress and by this court, whenever the question has arisen.' *United States* v. *Kagama*, 118 U. S. 375, 384."
>
> "As well said by the court below, 'If they are unable to resist the allurements by which they are enticed into making the conveyances, will they be expected to under-

take the difficult and protracted litigation necessary to set aside their own acts?' To ask these questions is to answer them. Congress intended that both the Indians and the members of the white race should obey its limitations. A trasfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States. If these Indians may be divested of their lands, they will be thrown back upon the Nation a pauperized, discontented and, possibly, belligerent people.' The authority to enforce restrictions of this character is the necessary complement of the power to impose them."

Thus we submit that the authority of the United States to enact legislation providing benefits to petitioners carries with it the power to enforce said benefits on behalf of its dependent Indian wards, and that clearly it was the duty of respondent to do so (Cohen's Handbook of Federal Indian Law, pp. 366-370).

In Cohen's Handbook of Federal Indian Law, p. 366, it is stated:

"* * * It is well settled that the United States, by virtue of its peculiar relations with the Indians—often called 'guardianship'—or as trustee of their property, has the capacity *and the duty* to effectuate Government policies by protecting and enforcing their rights in property held by it as trustee, or by the Indians themselves in fee simple, subject to restrictions on alienation." (Italics ours).

In the *United States* v. *Osage County*, 251 U. S. 128, 133, this Court said:

"Certain is it that as the *United States as guardian of the Indians had the duty to protect them from spoliation* and, therefore, the right to prevent their being illegally deprived of the property rights conferred under the Act of Congress of 1906, the power existed in the officers of the United States to invoke relief for the accomplishment of the purpose stated. Indeed the Act of Congress of 1917, providing for the appraisement of

the lands in question, *by necessary implication*, if not in express terms, treated the power of the officers of the United States to resist the illegal assessments as undoubted." (Italics ours).

Therefore, we submit that the United States was under a *duty* to enforce the benefits provided for petitioners in the cases at bar.

The Duties of the United States Under the Act of April 26, 1906.

The fourth and fifth causes of action involve the rights of petitioners to the benefits prescribed by Congress in the Act of April 26, 1906, c. 1876, 34 Stat. 137.

We submit that the United States, as guardian of petitioners, was required to enforce for the benefit of petitioners the provisions of said Act of April 26, 1906, and that the lower court erred in holding that the respondent was under no duty to act to protect the interests of its dependent Indian wards under this act.

Section 11 of said Act of April 26, 1906 required the Secretary of the Interior to collect all *revenues of whatever character* accruing to the petitioner. The lower court states that the allegations of the fourth cause of action would merely give rise to an action for trespass. Clearly the United States could have proceeded under this provision of law to collect the revenues arising out of the lands of petitioners thus unlawfully intruded upon by the railroad companies.

Section 18 of the Act of April 26, 1906, provided in part as follows:

> "That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the * * * Creek, or Seminole tribes * * * for the collection of any moneys or recovery of any land claimed by * * * said tribes."

Thus this act, by Sections 11 and 18, required not only that the Secretary of the Interior *shall* collect all revenues of whatever character due the tribes, but also he was specifically authorized to bring suit to enforce said collections and to recover lands claimed by said tribes.

Although said Section 18 is permissive in form, yet we submit that it is mandatory in effect. In 25 R. C. L., p. 770, it is stated:

> "* * * Hence, permissive words used in statutes conferring power or authority upon public officers or bodies will be held to be mandatory where the act authorized to be done concerns the public interest or the rights of individuals. The word 'may' in statutes conferring power upon public officers or official boards or tribunals may be so construed as to be the equivalent of 'shall' or 'must' where the public or individuals have an interest in the exercise of the powers conferred."

See also *Supervisors* v. *United States*, 4 Wall. 435; *French* v. *Edwards*, 13 Wall. 506; *Jaffray* v. *McGehee*, 107 F. S. 361.

Clearly this principle would apply with greater force when a fiduciary relationship exists between the parties.

We submit that the lower court erred in holding that said Section 18 was permissive and not mandatory in effect. Especially is this true when it is further considered that the Indian ward was unable to act on its own behalf, and its rights could be enforced only by action of the United States, its guardian.

The lower court criticizes our reference to *United States* v. *Creek Nation*, 295 U. S. 103, 109, and states that this case is not applicable to the question before us because that case was based upon facts which showed a direct liability on the part of the United States to its Indian ward (Creek case, R. 18).

In the Creek case (295 U. S. 103, 109-110) this Court said:

"* * * The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.' Lane v. Pueblo of Santa Rosa, 249 U. S. 110, 113; Cherokee Nation v. Hitchcock, 187 U. S. 294, 307-308."

The failure of the United States to file suit under this very Section 18 of the Act of 1906, was one of the elements considered by this Court in the Creek case in determining the liability of the United States. This Court said in that case (295 U. S. 103, 110):

"Plainly the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose. But, although having full knowledge of the facts, it made no effort in that direction."

In the Creek case this Court held that the failure of the United States to act to protect the Creek Nation in the possession of its lands after a full knowledge of the facts, created a taking of said lands by the United States, and in that case this Court did not require an express promise by the United States that it would be liable for the failure to act to protect its Indian ward, before the liability of the United States would arise. Clearly the statement of the lower court—to the effect that there would have to be an express statutory provision imposing liability on the Government if it fails to bring suit on behalf of its Indian ward (Creek case, R. 18)—is in error, as the law itself imposes liability on the guardian when it fails to act to protect the interests of its ward.

Clearly the United States could have filed suit to quiet title in the Creek Nation to lands embraced within said "station reservations", and therein demanded an accounting from the railroads for the rents and profits derived from the lands owned by petitioners. In the case of *United States, As Guardian of the Hualpai Tribe* v. *Sante Fe Pacific Railroad Company*, 314 U. S. 339, this Court held that the United States, as guardian of said Indian tribe, could demand of the railroad company an accounting for amounts received from lands leased by said railroad to third parties, with respect to the lands held by said tribe by immemorial possession.

In the cases at bar the petitioners owned the fee simple title to the lands in question, and the railroad companies were granted merely a right of user to such lands only that were *necessary* for railroad purposes. The lands enclosed in said "station reservations" were never used for railroad purposes, and were not necessary for the operation of said railroads, but were leased by them to third parties, and the income derived therefrom went into the coffers of the railroad companies. These facts were known to the United States, and although having the duty to act on behalf of its Indian ward, and having the power to demand an accounting of the railroads for said rents and profits, as is evidenced by the holding in the Hualpai case, and being under a further duty to act to protect the interests of petitioners under the provisions of the treaty of 1866, yet respondent did nothing to protect the interests of its Indian ward.

We are not forced to rely upon a violation of the plain provisions of Article V of the Treaty of June 21, 1866 alone. By Article X of the same treaty, the Creeks agreed that Congress may pass such legislation as it deems necessary for their protection. By Section 18 of the Act of April 26, 1906, the Secretary of the Interior was authorized to bring suit in the name of the United States for the recovery of

the possession of these lands. By Section 27 of the same act, these lands are held in trust by the United States for us. We claim the protection of this act, and contend that such protection was withheld from us. Our causes of action, therefore, are founded upon liabilities assumed by the defendant under positive treaties and statutes.

Thus the respondent, under the Treaty of 1866, took upon itself the duty of handling this matter for petitioners; under the rights granted to it to pass legislation for our benefit, it has seen fit to take away from us the right for us to bring suit to recover the possession of these lands ourselves; under the Act of April 26, 1906 it has seen fit to assume that duty itself; and respondent has done nothing.

Furthermore, R. S. 2114; Title 25, Sec. 174, p. 1007, U. S. Code (from Act of May 28, 1830, c. 148, 4 Stat. 411, 412), which applied to petitioners, provides:

> "The President is authorized to exercise general superintendence and care over any tribe or nation which was removed upon an exchange of territory under authority of the Act of May 28, 1830, 'to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi'; and to cause such tribe or nation to be protected, at their new residence, against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever."

We submit that under the applicable decisions of this Court the United States is liable for its failure to perform its plain treaty and statutory duties to its dependent Indian wards.

Conclusion.

For the reasons set forth above we respectfully request that this Court reverse the decision of the lower court and direct it to bring its views into conformity with the applicable views and decisions of this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 321.

THE CREEK NATION, *Petitioner*,

v.

THE UNITED STATES.

No. 322.

THE SEMINOLE NATION, *Petitioner*,

v.

THE UNITED STATES.

REPLY BRIEF OF PETITIONERS.

On Writs of Certiorari to the Court of Claims.

PAUL M. NIEBEIL,
C. MAURICE WEIDEMEYER,
W. W. PRYOR,
Counsel for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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THE UNITED STATES.

No. 322.

THE SEMINOLE NATION, *Petitioner*,

v.

THE UNITED STATES.

On Writs of Certiorari to the Court of Claims.

REPLY BRIEF OF PETITIONERS.

We will answer briefly the contentions of respondent.

RESPONDENT'S CONTENTION I.

The respondent contends that because the Indian tribes *agreed to sell* lands to the railroads by the Treaties of 1866, they cannot now claim that the railroads are trespassers,

even though the railroads were intruding on lands of petitioners and never used them for railroad purposes (Resp. Br. p. 9).

The two treaty railroads purchased no lands of petitioners under the Treaties of 1866. They merely took lands and paid nothing to the Indian tribes for them. The Treaties of 1866 and the Acts of Congress authorizing these railroads to construct railroads through the lands of petitioners intended that the railroads take only such lands of petitioners as were *necessary* for railroad purposes. With respect to lands taken and never used for necessary railroad purposes, the railroads were trespassers. These trespasses were permitted by the United States, the guardian, and hence the consequent liability of the United States for the violation of the Treaties of 1866

The respondent further contends that a violation of the guarantee of quiet possession would not make the United States liable for the trespasses of the railroads, and respondent cites the Nez Perce case, 95 C. Cls. 1, in support of this contention (Resp. Br. p. 9).

We submit that here respondent overlooks the fact that this guarantee of quiet possession *by the United States* is contained in the Treaties of 1866; that these treaties were between petitioners and the United States; that the treaties required the respondent to supervise the action of the railroads; and that the United States alone would be liable for a violation of this treaty guarantee. These were contractual obligations of the United States owing directly to petitioners under the Treaties of 1866.

The Nez Perce case, 95 C. Cls. 1, relied on by respondent, clearly has no application to the situation before us for in that case the trespasses were not supervised by the Government. As the court therein said:

> "There is no allegation that white people went upon plaintiff's lands at the direction of the defendant or even at its instigation. Liability is predicated solely on the defendant's failure to keep them out."

In the cases at bar the petitions allege that the intrusions of the railroads were *supervised and permitted by the United States* in violation of the Treaties of 1866 (Creek Case R. 3-4; Seminole case R. 2-3).

Furthermore, there was no guarantee of quiet possession in the Nez Perce treaty, as is contained in the Creek and Seminole treaties of 1866.

RESPONDENT'S CONTENTION II.

Respondent further contends that while Congress in the Act of February 28, 1902, provided that the railroads should compensate the Indians for lands taken and pay through the Secretary of the Interior, an annual charge per mile of railroad constructed, yet United States did not bind itself to assume the obligations of the railroads. *United States* v. *Algoma Lumber Company*, 305 U. S. 415, 421, is cited in support of this contention (Resp. Br. p. 2).

By the passage of the Act respondent did not assume the obligation of the railroads, and it was presumed that the railroads would comply with the provisions of the Act. However, by acting with respect to the lands of petitioners respondent did assume an obligation to its Indian wards. Given a *violation* of the Act of 1902 by the railroads, and a failure of the United States, the guardian, to act to protect the interests of its Indian wards against the railroads, then clearly the guardian is liable to its wards for the resulting loss to the trust estates.

In Bogert, Trusts and Trustees, Vol. 3, Sec. 592, pp. 1867-1868, it is stated:

> "As a portion of the process of assuming control of the trust property, the trustee has the duty of collecting choses in action which are a part of the trust estate. If he finds among the assets of the trust notes, bonds, mortgages, checks, drafts, judgments, or other contract or tort claims, he should proceed with reasonable diligence to collect as much money as possible from the obligors. For a failure to act toward this end with reasonable skill and celerity, the trustee will be liable. * * *" (Cases cited.)

And again in Section 594, pp. 1878-1879, it is stated:

> "The powers of the trustee naturally include the authority to maintain such suits and actions as are necessary to the execution of the trust and incident to the powers expressly or impliedly granted. Thus, where the circumstances of the trust warranted, a trustee has been allowed to bring ejectment, trespass to try title, an action to quiet title, or remove a cloud from it, a suit to exercise an option to buy land, a suit for an injunction against the execution of a lease or to restrain the foreclosure of a mortgage executed by himself, a suit to foreclose, an action to collect rents or rents and profits, a suit to follow trust property, to hold a predecessor liable in damages, conversion, damages for injury to trust property, to collect debts due himself as trustee, detinue, and replevin."

At the time the Act of February 28, 1902 was passed the United States had full administrative control over the property and affairs of these tribes. (*Cherokee Nation* v. *Hitchcock*, 187 U. S. 294.) Under the Curtis Act, approved June 28, 1898, c. 517, 30 Stat. 495, the United States began the division of the tribal estates among the members of the Five Civilized Tribes; and under subsequent agreements made with them, this work was continued by the Government. (See Original Creek Agreement, approved March 1, 1901, c. 676, 31 Stat. 861; Supplemental Creek Agreement, approved June 30, 1902, c. 1323, 32 Stat. 500; Original Seminole Agreement, approved July 1, 1898, c. 542, 30 Stat. 567; Supplemental Seminole Agreement, approved June 2, 1900, c. 610, 31 Stat. 250.)

Having full administrative control over all of the property and affairs of these tribes, certainly the United States was in duty bound to enforce the rights of these tribes as against the railroad companies under the Act of 1902. To hold that the guardian was not required to do so with respect to the railroads, when the United States had full control over all of the property and affairs of these tribes, would seem most unreasonable. If Congress had meant to

emancipate the Indian tribes in this respect, we believe that it would have clearly so stated (*Chippewa Indians* v. *United States*, 307 U. S. 1, 4-5).

The *Algoma Lumber Company* case, 305 U. S. 415, 421, clearly has no application to the situation before us. There a third party endeavored to hold the United States for overpayments under a contract made by the United States as agent for the Klamath Indian tribe. The United States was not a party to the contract, and this Court held that under the *general* jurisdiction of the Court of Claims the United States had not consented to be sued on contracts made as an agent of the tribe, and as to which the United States was not a contracting party. In this case no guardian and ward relationship existed between the parties, and there was no special jurisdictional act authorizing the suit against the United States.

The cases at bar are proceedings under special jurisdictional acts, permitting the wards to adjudicate any and all legal and equitable claims they may have against the United States, arising out of treaties and Acts of Congress in relation to Indian affairs. The Act of August 16, 1937, c. 651, 50 Stat. 650, expressly permitted the adjudication of legal and equitable claims presented by amended petitions filed before or after the passage of the act. The amended petitions here involved were on file in the Court of Claims when the Act of 1937 was passed, and clearly the court had jurisdiction to settle the claims therein presented.

RESPONDENT'S CONTENTION III.

The respondent contends that Section 11 of the Act of April 26, 1906 was merely an intragovernmental direction to the officers of the United States, and was not intended to make the Government liable when its officers failed to discharge their duties under it (Resp. Br. p. 10).

The Act of April 26, 1906, c. 1876, 34 Stat. 137, was a comprehensive statute prescribing rules for the completion of the disposition of the affairs of the Five Civilized Tribes,

begun under the Curtis Act and the agreements made with these tribes. Congress certainly intended that the officers of the United States comply with the act, and that said officers perform the duties required of them under the act with respect to the property of its Indian wards. Otherwise, the act would mean nothing. The petitioners claim the benefits prescribed by this act, and the jurisdictional acts expressly authorize them to sue for legal and equitable claims arising under and growing out of Acts of Congress in relation to Indian Affairs.

The *Sac and Fox* case, 220 U. S. 481, referred to by respondent, has no application to the question now before us for in that case this Court held that the officers of the United States had implicitly followed the directions contained in treaties and acts of Congress governing the disbursement of annuities due the Sac and Fox tribe; that a band of Indians, which had severed its connection with the tribe, could not sue for a part of the annuities due the tribe, for said annuities belonged to the tribe, and not to such a band. In other words, the tribe only could sue to enforce the treaties and Acts of Congress directing the manner in which the *tribal* annuities should be paid to the *tribe*.

The case of *Robertson* v. *Sichel*, 127 U. S. 507, 515, merely states the general law that the United States is not liable to third parties for the torts of its officers. There was no guardian and ward relationship in this case, and no jurisdictional acts such as those authorizing the cases at bar.

RESPONDENT'S CONTENTION IV.

Respondent contends that Section 18 of the Act of April 26, 1906, is merely permissive and not mandatory in effect (Resp. Br. p. 10). We have heretofore pointed out the well established principle that where the interests of third parties are involved such an act is mandatory in effect (Pet. Br. p. 30).

The respondent cites *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 295, in support of its assertion that petitioners

were not precluded by their wardship status from bringing suit on their own behalf. In that case the individuals of the tribe were also included as parties plaintiff, and the question of the right of the Cherokee Nation to bring suit was not raised (see Cohen's Handbook of Federal Indian Law, p. 284).

We have pointed out (Pet. Br. p. 23) that in the *Creek* case, 295 U. S. 103, 110, this Court has stated that the Creek Nation was not in a position where it could be expected to assume the burden of filing suit on its own behalf, but was entitled to rely upon the United States, its guardian, for needed protection of its interests.

In *United States* v. *United States Fidelity & Guaranty Co.*, 106 F. (2d) 804, 807, the Court said:

> "* * * It may not be amiss to recall at the outset certain well established principles. The United States as guardian of Indian tribes or individual Indians may institute appropriate suits or proceedings for the enforcement of the rights or the protection of the property of its Indian wards. Heckman v. United States, 224 U. S. 413, 32 S. Ct. 424, 56 L. Ed. 820; United States v. Noble, 237 U. S. 74, 35 S. Ct. 532, 59 L. Ed. 844; United States v. Board of Com'rs Osage County, 251 U. S. 128, 40 S. Ct. 100, 64 L. Ed. 184; La Motte v. United States, 254 U. S. 570, 41 S. Ct. 204, 65 L. Ed. 410; Cramer v. United States, 261 U. S. 219, 43 S. Ct. 342, 67 L. Ed. 622; United States v. Minnesota, 270 U. S. 181, 46 S. Ct. 298, 70 L. Ed. 539; Mars v. McDougal, 10 Cir., 40 F. 2d 247; Tiger v. Twin State Oil Co., 10 Cir., 48 F. 2d 509. The right to maintain suits or proceedings of that character is the necessary complement to its obligations of guardianship. And in such a suit or proceeding it is a real party even though it does not have any pecuniary interest in the final recovery. Heckman v. United States, supra; United States v. New Orleans Pac. R. Co., 248 U. S. 507, 39 S. Ct. 175, 63 L. Ed. 388; * * *"

This case was reversed by this Court on other grounds in 309 U. S. 506.

RESPONDENT'S CONTENTION V.

The respondent contends that the petitioners are asking the Court to go beyond the language of the special jurisdictional acts to uphold the claims presented in the amended petitions before us (Resp. Br. p. 11). We submit that this contention is in error. A cursory glance at the petitions will show that they present legal and equitable claims arising and growing out of treaties and statutes.

We are asking the Court to enforce the protection and benefits prescribed by treaty and statutes for these Indian wards of our Government. Clearly such claims arise and grow out of treaties and statutes. In fact, the very relationship of guardian and ward, existing between the United States and these Indian tribes, grows out of treaties and statutes, and the dealings of the United States with these dependent Indian tribes, as was stated by this Court in the *Kagama* case (Pet. Br. p. 27).

We have referred to the Act of May 28, 1830, (Pet. Br. p. 33), under which the President is given general superintendence and care over these tribes, and is directed to protect them.

The first treaty between the United States and these Indian tribes, the Treaty of August 7, 1790, 7 Stat. 35, Article II, provides in part that:

> "The undersigned Kings, Chiefs and Warriors, for themselves and all parts of the Creek Nation [The Semiholes were then a constituent part of the Creek Nation] within the limits of the United States, do acknowledge themselves, and the said parts of the Creek nation, to be under the protection of the United States of America, and of no other sovereign whosoever; * * *"

Thus the guardian relationship between the United States and the Indian nations has arisen by virtue of treaty and statutes. Given a violation of a treaty and act of Congress, and a duty of the United States arising thereunder, either express or implied, the jurisdictional acts do not preclude the application of legal and equitable principles to the situation, for said acts expressly permit the adjudication of *legal and equitable claims*.

In *Seminole Nation* v. *United States*, 316 U. S. 286, wherein this Court, under these same jurisdictional acts, upheld claims of a similar nature to those involved in the present controversy, this Court said (pp. 297-298):

> "Having formulated the proper rule of law, we must examine the facts of this case. Although the Court of Claims had jurisdiction of this issue, for such an action for breach of fiduciary duty growing out of treaty obligations is clearly an equitable claim within the meaning of the jurisdictional act, 43 Stat. 133, the court did not consider, and hence made no findings on this issue."

In Words and Phrases, Vol. 4 (Perm. Ed.), pp. 207, 212, it is stated:

> "A case 'arising under Act of Congress' is a controversy which turns on the existence, effect, or operation of an act of Congress, and hence a suit brought to determine the same is a case arising under such act within the statute. Hughes v. Northern Pac. R. Co., 18 F. 106, 110.
>
> * * * * * * * * *
>
> "Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute right or privilege, or claim, or protection or defense of the party by whom they are asserted. New Orleans, M. & T. R. Co. v. State of Mississippi, 102 U. S. 135, 141, 26 L. Ed. 96."

We submit that for the failure of the United States to enforce, by suit or otherwise, the provisions of treaties and statutes prescribing protection and benefits for its Indian wards, the respondent is liable for losses thus occasioned to the trust estates, under the special jurisdictional acts in the cases at bar.

Respectfully submitted,

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Counsel for Petitioners.

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Nos. 321, 322

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE CREEK NATION, PETITIONER

v.

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THE UNITED STATES

ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Creek R. 12–21) is not yet reported.

JURISDICTION

The judgments of the Court of Claims were entered on June 1, 1942 (Creek R. 21; Seminole R. 12). The petition for writs of certiorari was

filed August 21, 1942. Jurisdiction of this Court is invoked under section 3 (b) of the Act of February 13, 1925, 43 Stat. 939, as amended by the Act of May 22, 1939, 53 Stat. 752 (U. S. C., title 28, sec. 288 (b)).

QUESTION PRESENTED

Whether the Creek and Seminole Nations may recover money damages from the United States for its failure and refusal to oust certain railroads from lands which they appropriated from these tribes for right-of-way and station purposes, but which the railroads have not fully paid for and have not devoted exclusively to railroad uses.

STATUTES INVOLVED

Articles 1 and 5 of the treaty of March 21, 1866, 14 Stat. 755, between the Seminole Nation and the United States; Articles 1 and 5 of the treaty of June 14, 1866, 14 Stat. 785, between the Creek Nation and the United States; sections 13, 14, 15, and 16 of the Act of February 28, 1902, 32 Stat. 43; sections 11 and 18 of the Act of April 26, 1906, 34 Stat. 137; section 1 of the Seminole jurisdictional Act of May 20, 1924, 43 Stat. 133; and section 1 of the Creek jurisdictional Act of May 24, 1924, 43 Stat. 139, are set forth in the Appendix, *infra*, pages 13–24.

STATEMENT

The Seminole Nation, by Article V of the treaty of March 21, 1866, 14 Stat. 755, 757, granted "a right of way through their lands to any company

which shall be duly authorized by Congress . . . to construct a railroad from any point on their eastern to their western . . . boundary". And the tribe further agreed "to sell to . . . any company duly authorized as aforesaid, such [unoccupied] lands . . . lying along the line of said contemplated railroad, not exceeding on each side thereof a belt or strip of land three miles in width, at such price per acre as may be eventually agreed upon between said Seminole nation and the party or parties building said road". The Creek Nation made a similar agreement with the United States in the treaty of June 14, 1866, 14 Stat. 785, 787.

These treaties were subsequently implemented by special acts passed in July 1866 authorizing two designated companies to construct railroads across Creek and Seminole lands (Act of July 26, 1866, 14 Stat. 289; Act of July 27, 1866, 14 Stat. 292), and finally by a general statute extending a like privilege to all duly organized railroad companies (Act of February 28, 1902, 32 Stat. 43, 47–51). The 1902 act, beside providing for rights of way, permitted the railroads to acquire additional adjacent lands for station grounds and depots (not exceeding 200 feet in width and 2,000 feet in length) and for roundhouses, turntables, etc. (not exceeding 40 acres each). Before railroads could be constructed, full compensation for the right of way and other lands was to be made to the individual or tribal owner thereof (section 15). Each railroad

company was also required to pay, for the benefit of the particular tribe through whose land the railroad was constructed, an annual charge of fifteen dollars for each mile of road (section 16).

There have been constructed, pursuant to the foregoing treaties and statutes, a number of railroads across lands which were originally owned by the Creek and Seminole Nations but which have since been largely allotted in severalty.

In 1926 and 1930 the Creek and Seminole Nations filed suits in the Court of Claims (Creek R. 1; Seminole R. 1) to recover from the United States damages for an alleged misappropriation of land by the railroads, and for the alleged failure of the railroads to pay to the tribes the compensation prescribed by the statute of 1902. The petitions further alleged that the United States, as guardian or trustee of the Creek and Seminole Nations, had assumed complete control of the affairs of these tribes, and that the United States had failed and refused to recover the land and the compensation for the tribes.

The United States demurred to the petitions on the ground that the alleged cause of action did not arise under or grow out of a treaty or act of Congress, and that the court was therefore without jurisdiction to consider the claims (Creek R. 1, 13; Seminole R. 1). Act of May 20, 1924, 43 Stat. 133; Act of May 24, 1924, 43 Stat. 1639. These demurrers were ultimately sustained and the peti-

tions dismissed on the authority of *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494, a case involving similar claims by those tribes (Creek R. 1, 13; Seminole R. 1).

In 1933, with leave of court, the Creek and Seminole Nations filed amended petitions (Creek R. 2; Seminole R. 1). This time they alleged, as their first cause of action, that it was the duty of the United States to supervise the railroad right-of-way grants contained in the treaties of 1866 and to protect the tribes in the quiet possession of their national domains; that two companies which were granted right of way across the Creek and Seminole lands by the treaties and special acts of 1866 had also appropriated additional strips of land containing approximately twenty acres each for station grounds; that these additional strips of land were not needed and were not used for railroad purposes, and constituted an unauthorized intrusion by the railroads on lands owned by the tribes; and that the United States is liable to the tribes for damages resulting from the Government's failure to prevent these intrusions (Creek R. 2–5, Seminole R. 2–4).

For their second cause of action the petitioners alleged that it was the duty of the United States to supervise the acquisition of railroad rights of way under the Act of February 28, 1902; that certain other companies had acquired rights of way under the 1902 act; that the United States, in dis-

regard of the provisions of that act and of the Government's covenants of quiet possession contained in the treaties of 1866, had permitted these companies to stake out additional 20-acre strips of land as station reservations; that these additional strips of land were not needed for railroad purposes and constituted an unauthorized intrusion by the railroads on lands owned by the tribes; and that the United States is liable to the tribes for damages resulting from its failure to perform properly its obligations under the treaties of 1866 and the act of 1902 (Creek R. 5–7; Seminole R. 5–6).

For their third cause of action petitioners alleged that it was the duty of the United States to supervise the acquisition of rights of way under the Act of February 28, 1902; that certain companies had acquired rights of way under the 1902 act; that the railroads had failed to compensate the tribe for these rights of way and to pay the annual charges, as required by sections 15 and 16 of the act of 1902; and that the United States is liable to the tribes for its failure to compel the railroads to comply with that act (Creek R. 7–9; Seminole R. 6–8).

For their fourth cause of action petitioners repeated the allegations of their first and second causes, and then averred that it was the duty of the United States, under section 11 of the Act of April 26, 1906, to collect all revenues of whatever character accruing to the Creek and Seminole Na-

tions, and that for its failure to collect from the railroads moneys due the tribes the Government became liable for those amounts (Creek R. 9; Seminole R. 8).

And for their fifth and final cause of action petitioners repleaded the wrongs allegedly perpetrated by the railroads upon the tribes, and then averred that it was the duty of the United States, under section 18 of the Act of April 26, 1906, to bring suits to recover moneys due the tribes, and that for its failure to bring such suits the United States became liable for the value of the lands of which the petitioners have been deprived (Creek R. 10–11; Seminole R. 9–10).

To these amended petitions the United States again demurred, on the ground (1) that they failed to state facts sufficient to constitute a cause of action against the Unted States; and (2) that the court was without jurisdiction, because the alleged causes of action were predicated upon the common-law liability pertaining to the relationship of guardian and ward, and was not one "arising under or growing out" of a treaty, agreement, or act of Congress, as required by the special jurisdictional acts of 1924 (Creek R. 12; Seminole R. 11). The court below sustained the demurrers on both grounds (Creek R. 12–21; Seminole R. 11), and accordingly dismissed the petitions (Creek R. 21; Seminole R. 12). The Creek and Seminole Nations now seek certiorari.

ARGUMENT

1. The Creek and Seminole Nations do not object to the width of the rights-of-way which the various railroad companies acquired under the treaties of 1866 and the act of 1902 (Creek R. 11; Seminole R. 10).[1] In view of the fact that both the Creek and Seminole Nations agreed in the treaties of 1866 to sell to the railroads a strip of land up to three miles in width on each side of the right of way, petitioners cannot complain of the quantity of land acquired by the railroad companies. The Nations complain, instead, of the fact that the railroads, under the pretext of acquiring additional tracts for station grounds, staked off strips of land, each containing approximately twenty acres, and have not fully paid for this land and have since used it for non-railroad purposes (Pet. 14–15). Even if these allegations are admitted to be true, as the demurrer does admit them, it does not follow that the petition states a cause of action against the United States.

Under the treaties and statutes in question the lands were to be paid for by the railroads. The United States, neither expressly nor impliedly, assumed any obligations of a guarantor. The Government, in the exercise of its plenary power over

[1] Two hundred feet was the usual width allowed for railroad rights of way in statutes enacted during the era of railroad expansion. These acts likewise invariably permitted the railroads to acquire additional lands for station grounds, roundhouses, etc. See, *e. g.*, Act of March 3, 1875, 18 Stat. 482.

Indian affairs, enacted legislation implementing the treaties of 1866 and prescribing a method by which railroads could acquire from the tribes the necessary rights of way and station grounds. The exercise by Congress of its power to legislate with respect to Indian affairs "does not necessarily involve the assumption of contractual obligations by the government. Their assumption is not to be presumed in the absence of any action taken by the government or on its behalf indicating such a purpose." *United States* v. *Algoma Lumber Co.*, 305 U.S. 415, 421. As indicating an assumption of contractual liability, petitioners refer to Article I of the treaties of 1866 in which the United States guaranteed the tribes "quiet possession of their country" (Pet. 13–19); to section 11 of the Act of April 26, 1906, directing that revenues due these tribes "be collected by an officer appointed by the Secretary of the Interior" (Pet. 21–22); and to section 18 of the same act authorizing the Secretary to bring suits to collect moneys due the tribes (Pet. 21–24).

Since the Creek and Seminole Nations agreed in the treaties of 1866 to allow railroads to be constructed across their domains, it seems patent that acquisition of lands by the railroads in connection with the treaty purposes cannot be deemed a breach of the covenant guaranteeing the Indians "quiet possession" of their domain. In any event the Government is not made liable in the courts,

by a mere covenant of quiet possession, to respond in damages for injuries resulting from trespasses by third parties. *Nez Perce Tribe* v. *United States*, 95 C. Cls. 1, certiorari denied, May 25, 1942. *United States* v. *Creek Nation*, 295 U. S. 103, 109, relied on by petitioners (Pet. 17), merely holds that the United States is liable for its own intrusions and takings, not for those of others.

Section 11 of the 1906 act providing that revenues due the Five Tribes should be collected by a government agent rather than by the tribal treasurers, passed at a time when the dissolution of the tribal governments was believed to be imminent, constitutes only an intragovernmental direction to officers of the United States. Cf. *The Sac and Fox Indians*, 220 U. S. 481. Congress did not intend by that act to make the Government liable in the courts for all moneys which its officers failed in the discharge of their duties to collect. See *Robertson* v. *Sichel*, 127 U. S. 507, 515.

Similarly, section 18 of the 1906 act merely "authorizes" the Secretary of the Interior to bring suits on behalf of the Indians. It contains no undertaking by the United States to respond in damages in the event that such suits are not brought. Cf. *Pine Hill Co.* v. *United States*, 259 U. S. 191, 196. Contrary to assertions made by the petitioners (Creek R. 11; Seminole R. 10; Pet. 10), they are not precluded by their wardship status

from bringing suits on their own behalf. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 295. Section 18 of the 1906 act specifically recognized the capacity of these tribes to sue, both before and after the passage of the act.[2] And sections 15 and 16 of the 1902 act prescribed in detail the procedure by which the tribes could obtain from the railroads full compensation for lands taken for right-of-way and other uses.

Since the allegations of the petitions do not disclose any breach by the United States of a treaty, statutory, or contractual obligation, the court below rightly held that the petitions do not state a cause of action against the United States.

2. Even if the amended petitions be construed as showing a breach by the Government of the common-law duty of a guardian towards its wards, the dismissal by the Court of Claims was proper, because the special jurisdictional acts of 1924 under which these suits were brought limit the jurisdiction of the Court of Claims to controversies "arising under or growing out" of a treaty, agreement, or act of Congress. And the 1924 acts have been construed not to confer on the Court of Claims jurisdiction of causes of action "predicated upon the common law liabilities pertaining to the rela-

[2] "Where suit is *now pending, or may hereafter be filed* in any United States court in the Indian Territory, *by* or on behalf *of any one or more of the Five Civilized Tribes* * * *" [Italics supplied.] 34 Stat. 137, 144.

tionship of guardian and ward." *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494, 498. Such questions are political and not judicially cognizable. *Seminole Nation* v. *United States*, No. 348, October Term, 1941, decided May 11, 1942, relied on by petitioners (Pet. 18), holds that the Government in discharge of its affirmative treaty and statutory obligations (*e. g.*, the stipulated payment of money by the United States to an Indian tribe) may incur the responsibility of a fiduciary if it knowingly makes payments to corrupt Indian officials. The present case differs obviously since the United States did not have affirmative obligations to petitioners in respect of the railroad lands.

CONCLUSION

The decision of the Court of Claims is in accord with the applicable decisions of this Court, raising no new question of substance and presenting no conflict. It is therefore respectfully submitted that the petition should be denied.

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VERNON L. WILKINSON,
Attorney.

SEPTEMBER 1942.

APPENDIX

Articles I and V of the treaty of March 21, 1866, 14 Stat. 755, 757–758, between the Seminole Nation and the United States provide:

> ARTICLE I. There shall be perpetual peace between the United States and the Seminole nation, and the Seminoles agree to be and remain firm allies of the United States, and always faithfully aid the government thereof to suppress insurrection and put down its enemies.
>
> The Seminoles also agree to remain at peace with all other Indian tribes, and with themselves. In return for these pledges of peace and friendship, the United States guarantee them quiet possession of their country, and protection against hostilities on the part of other tribes; and in the event of such hostilities, that the tribe commencing and prosecuting the same shall make just reparation therefor. Therefore the Seminoles agree to a military occupation of their country at the option and expense of the United States.
>
> * * * * * * *
>
> ARTICLE V. The Seminole nation hereby grant a right of way through their lands to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point on their eastern to their western or southern boundary; but said railroad company, together with all its agents

and employes, shall be subject to the laws of the United States relating to the intercourse with Indian tribes, and also to such rules and regulations as may be prescribed by the Secretary of the Interior, for that purpose. And the Seminoles agree to sell to the United States, or any company duly authorized as aforesaid, such lands no legally owned or occupied by a member or members of the Seminole nation lying along the line of said contemplated railroad, not exceeding on each side thereof a belt or strip of land three miles in width, at such price per acre as may be eventually agreed upon between said Seminole nation and the party or parties building said road—subject to the approval of the President of the United States: *Provided, however,* That said land thus sold shall not be reconveyed, leased, or rented to, or be occupied by, any one not a citizen of the Seminole nation, according to its laws and recognized usages: *Provided, also,* That officers, servants, and employes of said railroad necessary to its construction and management shall not be excluded from such necessary occupancy, they being subject to the provisions of the Indian intercourse laws, and such rules and regulations as may be established by the Secretary of the Interior; nor shall any conveyance of said lands be made to the party building and managing said road, until its completion as a first-class railroad and its acceptance as such by the Secretary of the Interior.

Articles I and V of the treaty of June 14, 1866, 14 Stat. 785, 786, 787–788, between the Creek Nation and the United States, provide:

ARTICLE I. There shall be perpetual peace and friendship between the parties to this

treaty, and the Creeks bind themselves to remain firm allies and friends of the United States, and never to take up arms against the United States, but always faithfully to aid in putting down its enemies. They also agree to remain at peace with all other Indian tribes; and, in return, the United States guarantees them quiet possession of their country, and protection against hostilities on the part of other tribes. In the event of hostilities, the United States agree that the tribe commencing and prosecuting the same, shall, as far as may be practicable, make just reparation therefor. To insure this protection, the Creeks agree to a military occupation of their country, at any time, by the United States, and the United States agree to station and continue in said country from time to time, at its own expense, such force as may be necessary for that purpose. * * *

* * * * * *

ARTICLE V. The Creek nation hereby grant a right of way through their lands, to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south of the Creek country, and likewise from any point on their eastern to their western or southern boundary, but said railroad company, together with all its agents and employees, shall be subject to the laws of the United States relating to intercourse with Indian tribes, and also to such rules and regulations as may be prescribed by the Secretary of the Interior for that purpose, and the Creeks agree to sell to the United

States, or any company duly authorized as aforesaid, such lands not legally owned or occupied by a member or members of the Creek nation, lying along the line of said contemplated railroad, not exceeding on each side thereof a belt or strip of land three miles in width, at such price per acre as may be eventually agreed upon between said Creek nation and the party or parties building said road, subject to the approval of the President of the United States: *Provided, however,* That said land thus sold shall not be reconveyed, leased, or rented to, or be occupied by any one not a citizen of the Creek nation, according to its laws and recognized usages: *Provided, also,* That officers, servants, and employes of said railroad necessary to its construction and management, shall not be excluded from such necessary occupancy, they being subject to the provisions of the Indian intercourse law and such rules and regulations as may be established by the Secretary of the Interior, nor shall any conveyance of any of said lands be made to the party building and managing said road until its completion as a first-class railroad, and its acceptance as such by the Secretary of the Interior.'

Sections 13, 14, 15 and 16 of the Act of February 28, 1902, 32 Stat. 43, 47–49, provide:

SEC. 13. That the right to locate, construct, own, equip, operate, use, and maintain a railway and telegraph and telephone line or lines into, in, or through the Indian Territory, together with the right to take and condemn lands for right of way, depot grounds, terminals, and other railway purposes, in or through any lands held by any Indian tribe or nation, person, individual,

or municipality in said Territory, or in or through any lands in said Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any railway company organized under the laws of the United States, or of any State or Territory, which shall comply with this Act.

SEC. 14. That the right of way of any railway company shall not exceed one hundred feet in width except where there are heavy cuts and fills, when one hundred feet additional may be taken on each side of said right of way; but lands additional and adjacent to said right of way may be taken and condemned by any railway company for station grounds, buildings, depots, side tracks, turnouts, or other railroad purposes not exceeding two hundred feet in width by a length of two thousand feet. That additional lands not exceeding forty acres at any one place may be taken by any railway company when necessary for yards, roundhouses, turntables, machine shops, water stations, and other railroad purposes. And when necessary for a good and sufficient water supply in the operation of any railroad, any such railway company shall have the right to take and condemn additional lands for reservoirs for water stations, and for such purpose shall have the right to impound surface water or build dams across any creek, draw, canyon, or stream, and shall have the right to connect the same by pipe line with the railroad and take the necessary grounds for such purposes; and any railway company shall have the right to

change or straighten its line, reduce its grades or curves, and locate new stations and to take the lands and right of way necessary therefor under the provisions of this Act.

SEC. 15. That before any railroad shall be constructed or any lands taken or condemned for any of the purposes set forth in the preceding section, full compensation for such right of way and all land taken and all damage done or to be done by the construction of the railroad, or the taking of any lands for railroad purposes, shall be made to the individual owner, occupant, or allottee of such lands, and to the tribe or nation through or in which the same is situated: *Provided*, That correct maps of the said line of railroad in sections of twenty-five miles each, and of any lands taken under this Act, shall be filed in the Department of the Interior, and shall also be filed with the United States Indian agent for Indian Territory, and with the principal chief or governor of any tribe or nation through which the lines of railroad may be located or in which said lines are situated.

In case of the failure of any railway company to make amicable settlement with any individual owner, occupant, allottee, tribe, or nation for any right of way or lands or improvements sought to be appropriated or condemned under this Act, all compensation and damages to be paid to the dissenting individual owner, occupant, allottee, tribe, or nation by reason of the appropriation and condemnation of said right of way, lands, or improvements shall be determined by the appraisement of three disinterested referees, to be appointed by the judge of the United States court, or other court of jurisdiction in

the district where such lands are situated, on application of the corporation or other person or party in interest. Such referees, before entering upon the duties of their appointment shall each take and subscribe, before competent authority, an oath that he will faithfully and impartially discharge the duties of his appointment, which oaths, duly certified, shall be returned with the award of the referees to the clerk of the court by which they were appointed. The referees shall also find in their report the names of the person and persons, tribe, or nation to whom the damages are payable and the interest of each person, tribe, or nation in the award of damages. Before such referees shall proceed with the assessment of damages for any right of way or other lands condemned under this Act, twenty days' notice of the time when the same shall be condemned shall be given to all persons interested, by publication in some newspaper in general circulation nearest said property in the district where said right of way or said lands are situated, or by ten days' personal notice to each person owning or having any interest in said lands or right of way: *Provided,* That such notice to any tribe or nation may be served on the principal chief or governor of the tribe. If the referees can not agree, then any two of them are authorized to and shall make the award. Any party to the proceedings who is dissatisfied with the award of the referees shall have the right, within ten days after the making of the award, to appeal, by original petition, to the United States court, or other court of competent jurisdiction, sitting at the place nearest and most convenient to the property sought to be taken, where the question of the damages occasioned by the taking of the lands in controversy shall be tried

de novo, and the judgment rendered by the court shall be final and conclusive, subject, however, to appeal as in other cases.

When the award of damages is filed with the clerk of the court by the referees, the railway company shall deposit the amount of such award with the clerk of the court, to abide the judgment thereof, and shall then have the right to enter upon and take possession of the property sought to be condemned: *Provided,* That when the said railway company is not satisfied with the award, it shall have the right, before commencing construction, to abandon any portion of said right of way and adopt a new location, subject, however, as to such new location, to all the provisions of this Act. Each of the referees shall receive for his compensation the sum of four dollars per day while actually engaged in the appraisement of the property and the hearing of any matter submitted to them under this Act. Witnesses shall receive the fees and mileage allowed by law to witness in courts of record within the districts where such lands are located. Costs, including compensation of the referees, shall be made part of the award or judgment and be paid by the railway company: *Provided,* That if any party or person other than the railway company shall appeal from any award, and the judgment of the court does not award such appealing party or person more than the referees awarded, all costs occasioned by such appeal shall be paid by such appealing party or person.

SEC. 16. That where a railroad is constructed under the provisions of this Act there shall be paid by the railway company to the Secretary of the Interior, for the benefit of the particular tribe or nation through

whose lands any such railroad may be constructed, an annual charge of fifteen dollars per mile for each mile of road constructed, the same to be paid so long as said lands shall be owned and occupied by such nation or tribe, which payment shall be in addition to the compensation otherwise provided herein; and the grants herein are made upon the condition that Congress hereby reserves the right to regulate the charges for freight and passengers on said railways and messages on all telegraph and telephone lines until a State government or governments shall exist in said Territory within the limits of which any railway shall be located; and then such State government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights within their respective limits by such railways; but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railways whenever such transportation shall extend from one State into another, or shall extend into more than one State; and that the railway companies shall carry the mail at such prices as Congress may by law provide; and until such rate is fixed by law the Postmaster-General may fix the rate of compensation.

Sections 11 and 18 of the Act of April 26, 1906, 34 Stat. 137, 141, 144, provide:

SEC. 11. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him;

and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. All such claims arising before dissolution of the tribal governments shall be presented to the Secretary of the Interior within six months after such dissolution, and he shall make all rules and regulations necessary to carry this provision into effect and shall pay all expenses incident to the investigation of the validity of such claims or indebtedness out of the tribal funds: *Provided*, That all taxes accruing under tribal laws or regulations of the Secretary of the Interior shall be abolished from and after December thirty-first, nineteen hundred and five, but this provision shall not prevent the collection after that date nor after dissolution of the tribal government of all such taxes due up to and including December thirty-first, nineteen hundred and five, and all such taxes levied and collected after the thirty-first day of December, nineteen hundred and five, shall be refunded.

* * * * * *

SEC. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the tribal governments, and the United States courts in Indian Territory are hereby given

jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits: *Provided,* That proceedings to which any of said tribes is a party pending before any court or tribunal at the date of dissolution of the tribal governments shall not be thereby abated or in anywise affected, but shall proceed to final disposition.

Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him.

Section 1 of the Seminole jurisdictional Act of May 20, 1924, 43 Stat. 133, provides:

* * * That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not hereto-

fore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

Section 1 of the Creek jurisdictional Act of May 24, 1924, 43 Stat. 139, provides:

> * * * That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States: *Provided, however,* That the provisions of this Act shall not be construed to confer jurisdiction upon the court to hear, examine, consider, and adjudicate any balance claimed to be due on the so-called Loyal Creek claim, or any amount claimed to be due to equalize allotments among members of the Creek Tribe.

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DEC 14 1942

Nos. 321, 322

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE CREEK NATION, PETITIONER

v.

THE UNITED STATES

THE SEMINOLE NATION, PETITIONER

v.

THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (Creek R. 12-21) is not yet reported.

JURISDICTION

The judgments of the Court of Claims were entered on June 1, 1942 (Creek R. 21; Seminole R. 12). The petition for writs of certiorari was filed August 21, 1942, and granted October 19, 1942. Jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925, 43 Stat. 939, as-

amended by the Act of May 22, 1939, 53 Stat. 752, 28 U. S. C. sec. 288 (b).

QUESTIONS PRESENTED

1. Whether the Creek and Seminole Nations may recover money damages from the United States for its failure and refusal to oust certain railroads from lands which the tribes granted the railroads for right of way and station purposes, but which the railroads have not fully paid for and have not devoted exclusively to railroad uses, and for its failure to bring suit against the railroads for moneys which might be due the tribes.

2. Whether the Court of Claims has jurisdiction of suits not based on a treaty or statutory obligation.

STATUTES INVOLVED

Articles I and V of the Treaty of March 21, 1866, 14 Stat. 755, between the Seminole Nation and the United States; Articles I and V of the Treaty of June 14, 1866, 14 Stat. 785, between the Creek Nation and the United States; Sections 13–16 of the Act of February 28, 1902, 32 Stat. 43; Sections 11 and 18 of the Act of April 26, 1906, 34 Stat. 137; Section 1 of the Seminole jurisdictional Act of May 20, 1924, 43 Stat. 133; and Section 1 of the Creek jurisdictional Act of May 24, 1924, 43 Stat. 139, are printed in chronological order in the Appendix, *infra*, pp. 29–40.

STATEMENT

The Seminole Nation, by Article V of the Treaty of March 21, 1866, 14 Stat. 755, 757, granted

"a right of way through their lands to any company which shall be duly authorized by Congress, * * * to construct a railroad from any point on their eastern to their western * * * boundary." And the tribe further agreed "to sell to * * * any company duly authorized as aforesaid, such [unoccupied] lands * * * lying along the line of said contemplated railroad, not exceeding on each side thereof a belt or strip of land three miles in width, at such price per acre as may be eventually agreed upon between said Seminole nation and the party or parties building said road". The Creek Nation made a similar agreement with the United States in the Treaty of June 14, 1866, 14 Stat. 785, 787.

These treaties were subsequently implemented by special Acts passed in July 1866 authorizing two designated companies to construct railroads across Creek and Seminole lands (Act of July 26, 1866, 14 Stat. 289;[1] Act of July 27, 1866, 14 Stat. 292), and finally by a general statute ex-

[1] Section 10 provides:

And be it further enacted, That said Pacific Railroad Company, southern branch, its successors and assigns, shall have the right to negotiate with, and acquire title to land for railroad purposes from, any Indian nation or tribe authorized by the United States to dispose of lands, and from any other nation or tribe of Indians through whose lands said railroad may pass, subject to the approval of the United States, or from any company or parties incorporated or authorized for such purposes, by such nation or tribe, or which such parties may have acquired under the laws of the United States.

tending a like privilege to all duly organized railroad companies (Sections 13 *et seq.* of the Act of February 28, 1902, 32 Stat. 43, 47–51). The 1902 Act, beside providing for rights of way, permitted the railroads to acquire additional adjacent lands for station grounds and depots (not exceeding 200 feet in width and 2,000 feet in length) and for roundhouses, turntables, etc. (not exceeding 40 acres each) (sec. 14, Appendix, *infra*, pp. 33–34). Before railroads could be constructed, full compensation for the right of way and other lands was to be made to the individual or tribal owner thereof (sec. 15, Appendix, *infra*, pp. 34–36). If the parties were unable to agree on the amount of compensation, damages were to be ascertained by referees appointed by the United States district court, and either party could appeal from the award and receive a trial *de novo* in the district court (sec. 15). Each railroad company was also required to pay, for the benefit of the particular tribe through whose land the railroad was constructed, an annual charge of $15 for each mile of road (sec. 16, Appendix, *infra*, pp. 36–37).

There have been constructed, pursuant to the foregoing treaties and statutes, a number of railroads across lands which were originally owned by the Creek and Seminole Nations but which have since been largely allotted in severalty.[2]

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[2] The Creek Nation at one time held all these lands in fee simple, pursuant to the grant contained in the Treaty of February 14, 1833, 7 Stat. 417. *United States* v. *Creek*

In 1926 and 1930 the Creek and Seminole Nations filed suits in the Court of Claims (Creek R. 1; Seminole R. 1) to recover from the United States damages for an alleged misappropriation of land by the railroads, and for the alleged failure of the railroads to pay to the tribes the compensation prescribed by the statute of 1902. The petitions further alleged that the United States, as guardian or trustee of the Creek and Seminole Nations, had assumed complete control of the affairs of these tribes, and that the United States had failed and refused to recover the land and the compensation for the tribes.

The United States demurred to the petitions on the ground that the alleged cause of action did not arise under or grow out of a treaty or Act of Congress, and that the court was therefore without jurisdiction to consider the claims (Creek R. 1, 13; Seminole R. 1). Act of May 20, 1924, 43 Stat. 133; Act of May 24, 1924, 43 Stat. 139. These demurrers were ultimately sustained and the petitions dismissed on the authority of *Choctaw and Chickasaw Nations* v. *United States*, 75

Nation, 295 U. S. 103, 105. In the Treaty of June 14, 1866, Articles III, VIII, 14 Stat. 785, 786, 788, the Creeks ceded the westerly half of their domain to the United States, two hundred thousand acres of which were thereupon conveyed to the Seminole Nation pursuant to the Treaty of March 21, 1866, 14 Stat. 755. The Curtis Act of June 28, 1898, 30 Stat. 495, provided for the allotment of these tribal lands in severalty.

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C. Cls. 494, a case involving similar claims by those tribes (Creek R. 1, 13; Seminole R. 1).

In 1933, with leave of court, the Creek and Seminole Nations filed amended petitions (Creek R. 2; Seminole R. 1). This time they alleged, as their first cause of action, that it was the duty of the United States to supervise the railroad right of way grants contained in the treaties of 1866 and to protect the tribes in the quiet possession of their national domains; that two companies which were granted rights of way across the Creek and Seminole lands by the treaties and special Acts of 1866 had also appropriated additional strips of land containing approximately twenty acres each for station grounds; that these additional strips of land were not needed and were not used for railroad purposes and constituted an unauthorized intrusion by the railroads on lands owned by the tribes; and that the United States is liable to the tribes for damages resulting from the Government's failure to prevent these intrusions (Creek R. 2–5; Seminole R. 2–4).

For their second cause of action petitioners alleged that it was the duty of the United States to supervise the acquisition of railroad rights of way under the Act of February 28, 1902; that certain other companies had acquired rights of way under the 1902 Act; that the United States, in disregard of the provisions of that Act and of the Government's covenants of quiet possession contained in

the treaties of 1866, had permitted these companies to stake out additional 20-acre strips of land as station reservations; that these additional strips of land were not needed for railroad purposes and constituted an unauthorized intrusion by the railroads on lands owned by the tribes; and that the United States is liable to the tribes for damages resulting from its failure to perform properly its obligations under the treaties of 1866 and the Act of 1902 (Creek R. 5–7; Seminole R. 5–6).

For their third cause of action petitioners alleged that it was the duty of the United States to supervise the acquisition of rights of way under the Act of February 28, 1902; that certain companies had acquired rights of way under the 1902 Act; that the railroads had failed to compensate the tribe for these rights of way and to pay the annual charges, as required by Sections 15 and 16 of the Act of 1902; and that the United States is liable to the tribes for its failure to compel the railroads to comply with that Act (Creek R. 7–9; Seminole R. 6–8).

For their fourth cause of action petitioners repeated the allegations of their first and second causes, and then averred that it was the duty of the United States, under Section 11 of the Act of April 26, 1906, to collect all revenues of whatever character accruing to the Creek and Seminole Nations; that the railroad companies were permitted to rent the lands "unlawfully intruded upon" and

convert the rents to their own uses; and that for the violation of its duty to collect the rents derived from petitioners' land, the Government became liable for those amounts (Creek R. 9; Seminole R. 8).

And for their fifth and final cause of action petitioners repleaded the wrongs allegedly perpetrated by the railroads upon the tribes, and then averred that it was the duty of the United States, under Section 18 of the Act of April 26, 1906, to bring suits to recover moneys due the tribes, and that for its failure to bring such suits the United States became liable for the value of the lands of which petitioners have been deprived (Creek R. 10–11; Seminole R. 9–10).

To these amended petitions the United States again demurred, on the ground (1) that they failed to state facts sufficient to constitute causes of action against the United States; and (2) that the court was without jurisdiction, because the alleged causes of action were predicated upon the common law liability pertaining to the relationship of guardian and ward, and did not arise under or grow out of a treaty, agreement, or Act of Congress, as required by the special jurisdictional Acts of 1924 (Creek R. 12; Seminole R. 11). The court below sustained the demurrers on both grounds (Creek R. 12–21; Seminole R. 11), and accordingly dismissed the petitions (Creek R. 21; Seminole R. 12).

SUMMARY OF ARGUMENT

I

The Indians by treaty agreed to sell to authorized railroads strips of land on each side of the line of the railroad not exceeding three miles in width. Having so agreed, they cannot now be heard to claim that the railroads are trespassers even though it be said that the railroads are not using part of the land taken for railroad purposes. The United States, by covenanting in treaties with the Indians that in return for their agreeing to remain at peace with all other Indian tribes they would be guaranteed quiet possession of their country, did not make itself liable to respond in damages for injuries resulting from trespasses by third parties. *Nez Percé Tribe* v. *United States*, 95 C. Cls. 1, certiorari denied, 316 U. S. 686. The purpose was to assure petitioners they would be secure in their country from the encroachment of hostile Indians.

II

Congress, while providing in the Act of February 28, 1902, that the railroads should compensate the Indians for land taken and pay them, through the Secretary of the Interior, an annual charge per mile of railroad constructed, did not bind itself to assume the obligations of the railroads. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421.

III

Section 11 of the 1906 Act providing that revenues due the Five Tribes should be collected by a Government agent rather than by the tribal treasurers, passed at a time when the dissolution of the tribal governments was believed to be imminent, constitutes only an intragovernmental direction to officers of the United States. Cf. *The Sac and Fox Indians*, 220 U. S. 481. Congress did not intend by that Act to make the Government liable in the courts for all moneys which its officers failed to collect in the discharge of their duties. See *Robertson* v. *Sichel*, 127 U. S. 507, 515.

IV

Section 18 of the 1906 Act merely "authorizes" the Secretary of the Interior to bring suits on behalf of the Indians. It contains no undertaking by the United States to respond in damages in the event that such suits are not brought. Cf. *Pine Hill Co.* v. *United States*, 259 U. S. 191, 196. Contrary to assertions made by petitioners, they are not precluded by their wardship status from bringing suits on their own behalf. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 295. Section 18 of the 1906 Act specifically recognized the capacity of these tribes to sue, both before and after the passage of the Act.

V

Under the special jurisdictional Acts of 1924, the jurisdiction of the Court of Claims is limited to controversies "arising under or growing out" of a treaty, agreement, or Act of Congress. There was no obligation "arising under or growing out" of a treaty, agreement, or Act of Congress, as required (*Seminole Nation* v. *United States,* 316 U. S. 286), and suits based on a breach by the Government of the common law duty of a guardian toward its wards will not lie. *Choctaw and Chickasaw Nations* v. *United States,* 75 C. Cls. 494, 498. Special jurisdictional Acts are to be strictly construed and implications as to jurisdiction under their terms is forbidden. *Blackfeather* v. *United States,* 190 U. S. 368; *Price* v. *United States and Osage Indians,* 174 U. S. 373.

ARGUMENT

Introduction.—Petitioners' case proceeds upon the theory that by treaties and statutes the United States assumed certain liabilities in the nature of contractual obligations to the Indians; that it has not discharged these obligations; and that therefore petitioners have a valid cause of action against the Government for their breach. Under the treaties and statutes in question, lands granted by the tribes for rights of way and station grounds were to be paid for by the railroads and used for railroad purposes. The United States neither ex-

pressly nor impliedly promised to answer to the tribes if the railroads failed to carry out their obligations. The exercise by Congress of its power to legislate with respect to Indian affairs "does not necessarily involve the assumption of contractual obligations by the government. Their assumption is not to be presumed in the absence of any action taken by the government or on its behalf indicating such a purpose." *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421.

A fundamental error in petitioners' reasoning results from their confusing the concepts of *power* or authority in the United States to bring suits on behalf of Indian tribes or individual Indians and *obligation* to institute proceedings in their behalf. Obviously, the Government could have brought such suits as the petitioners think should have been brought, but it was not bound to do so by treaty or statute. Therefore, cases such as *Heckman* v. *United States*, 224 U. S. 413, *United States* v. *Osage County*, 251 U. S. 128, and *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U. S. 339, relied upon by petitioners (Br. 27, 28, 32), in which the power of the United States to sue on behalf of Indians was challenged, are of no assistance in the determination of the instant issues. Here the question is whether the United States had incurred an obligation by treaty or statute to sue on behalf of the Indians rather than whether it had merely authority to do so. The existence of such an obligation is essential to a determination that Con-

gress in the jurisdictional Acts of 1924 has authorized the Court of Claims to entertain these suits, and if it has not, the courts cannot go beyond the language of the statutes. *Price* v. *United States and Osage Indians*, 174 U. S. 373; *Blackfeather* v. *United States*, 190 U. S. 368.

As indicating an assumption of contractual liability by the Government, petitioners refer to Article I of the treaties of 1866 in which the United States guaranteed the tribes "quiet possession of their country" (Br. 21–24); to Sections 15 and 16 of the Act of February 28, 1902, providing that the railroads should compensate the Indians for land taken and pay them, through the Secretary of the Interior, an annual charge per mile of railroad constructed (Br. 24–29); to Section 11 of the Act of April 26, 1906, directing that revenues due these tribes "be collected by an officer appointed by the Secretary of the Interior" (Br. 29, 30); and to Section 18 of the same Act authorizing the Secretary to bring suits to collect moneys due the tribes (Br. 29–32). But in none of these treaties or statutes was any such liability assumed[3] and therefore the jurisdictional Acts of 1924 would not apply. *Seminole Nation* v. *United States*, 316 U. S. 286; *United States* v. *Mil. Lac Chippewas*, 229 U. S. 498, 500; *United States* v. *Old Settlers*, 148 U. S. 427, 468, 469.

[3] Petitioners refer (Br. 33) to R. S. 2114 (25 U. S. C. 174). But that statute merely gives authority for the exercise of "general superintendence and care" of Indian tribes and casts no legal duty on the United States.

I

THE COVENANT OF "QUIET POSSESSION" IN THE TREATIES OF 1866 DID NOT BIND THE UNITED STATES TO RECOMPENSE THE INDIANS FOR INJURIES RESULTING FROM THE WRONGFUL USE BY THE RAILROADS OF LANDS GRANTED THEM FOR RAILROAD PURPOSES

Petitioners' principal contention is that the railroads, in using their "station reservations" for non-railroad purposes,[4] are in effect intruders; that the Government, in failing to oust the railroads from lands which they are unlawfully using, has breached its covenants in Article I of the 1866 treaties guaranteeing the Indians "quiet possession of their country"; and that the tribes are entitled to recover money damages from the United States for the resulting injuries (Br. 18–24). This contention is based on an erroneous interpretation of the 1866 treaties. Article I of the Creek Treaty, substantially the same as Article I of the Seminole Treaty, reads in part as follows:

> They [the Creek Indians] also agree to remain at peace with all other Indian tribes; and, in return, the United States guarantees

[4] The demurrers of course admit the truth of this allegation and all other facts well pleaded. They do not admit, as petitioners seem to think (Br. 19–20), that fencing the station reservations by the railroads constituted "unauthorized and unlawful intrusions"; that petitioners have no means of recovering in their own names the station reservations "but must rely upon the action of the United States"; and they admit no other conclusions of law.

> them quiet possession of their country, and protection against hostilities on the part of other tribes. * * *

Petitioners contend (Br. 21) that this Article guarantees the Creek nation quiet possession of its country *and* protection against hostilities of other tribes. Even granting additive effect to the word "and" (cf *Montello Salt Co.* v. *Utah*, 221 U. S. 452, 466), it is obvious from the context of the provision as a whole that it constituted an agreement that in consideration of the Creeks remaining at peace with all other Indian tribes, the United States would see that other tribes would not be permitted to occupy Creek land and that the Creeks would be protected if force were used by other Indians in an attempted intrusion.

The primary intent of the framers of this provision was to assure the Indians that they would be secure in their country from the encroachment of hostile Indians of other tribes. The language following the quoted provision makes this conclusion inescapable:

> In the event of hostilities, the United States agree that the tribe commencing and prosecuting the same, shall, as far as may be practicable, make just reparation therefor. To insure this protection, the Creeks agree to a military occupation of their country, at any time, by the United States, and the United States agree to station and continue in said country from time to time, at its own

expense, such force as may be necessary for that purpose. * * *

Article I of the Seminole Treaty is similar in this respect as well.

Certainly these provisions were not intended to apply to railroads. In Article V of the treaties the Creek and Seminole Nations agreed to allow railroads to be constructed across their domains, and specifically agreed to sell to the railroad companies three-mile strips of land on each side of the line of the roadbed. Having agreed that this land might be occupied by the railroads, it cannot logically be contended by the Indians that such occupancy would be a trespass constituting a breach of the covenant guaranteeing the Indians "quiet possession of their country".

The proviso in Article V that the land thus sold shall not be reconveyed, leased, or rented to anyone not a citizen of the Indian reservation has no bearing on the question of whether there has been a trespass. This language is nothing more than a directive to the railroad companies as to the use

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Clearly, the "covenant of quiet possession" is not to be treated as the technical "covenant of quiet enjoyment" found in many deeds. If it were so treated, it would not be violated by the actions of the railroads in the instant cases. An action for the breach of such a covenant can only be sustained where the person claiming its benefits has been prevented from taking possession or has been evicted by a person having a lawful and paramount title existing at the time the covenant was made. *Brown* v. *International Land Co.*, 29 Okla. 341, 344, 116 Pac. 799 (1911); *Pabst Brewing Co.* v. *Thorley*, 145 Fed. 117 (C. C. A. 2d), certiorari denied, 203 U. S. 597.

of the land after acquisition, noncompliance with which would be a matter of controversy between them and the Indians.

That the Government is not made liable in the courts, by a covenant of quiet possession, to respond in damages for injuries resulting from trespasses by third parties (it being assumed *arguendo* that the railroads stand in such a position) is squarely decided by the case of *Nez Percé Tribe* v. *United States*, 95 C. Cls. 1, certiorari denied, 316 U. S. 686. There it was provided by treaty that land should be set apart as an Indian reservation for the exclusive use and benefit of the Nez Percé Tribe and that no white man should "be permitted to reside upon the said reservation without permission of the tribe" (Article II of the Treaty of June 11, 1855, 12 Stat. 957, 958).* Certain white men went upon the reservation without permission and removed gold therefrom. The Indians sued the United States for the value of the gold upon the theory that it was the intent of the treaty that the United States guarantee that no white men should reside on the reservation and that the Government would respond in damages if they did. The court held that it was not intended by the treaty to impose on the United States any greater duty to protect the Indians in the peaceful occupation and possession of property than already existed and that it had not expressly assumed an

* This provision certainly is of no less effect than a covenant of quiet possession.

obligation to respond in damages if the protection afforded was not adequate. The court stated (p. 10) that such an obligation would not be implied unless such implication were inescapable and added (pp. 10–11):

> The treaty says that white persons shall not be permitted to reside on the reservation, but it does not say that if they do the United States shall be liable in damages for any injury done by them. * * *
>
> * * * * * *
>
> The agreement was intended to do no more than to make it as plain as possible that the reservation was intended for the sole use and benefit of the tribe and that the defendant would do what it could to effect that, or, failing in this, to afford plaintiff redress in its courts against the wrongdoer.

Even in the case of trespasses by hostile Indians, all the Government agreed to in the treaties of 1866 was that the hostile tribe should make just reparation therefor (see Article I of each treaty). The duty of the United States in such a contingency obviously would not go beyond the application of pressure upon the hostile tribe to make restitution; otherwise, the language of the treaties would have so provided. Plainly, there was no contract of guarantee. Cf. *Leighton* v. *United States*, 161 U. S. 291, 296.

The case of *United States* v. *Creek Nation*, 295 U. S. 103, relied upon by petitioners (Br. 22–23, 30–31) is authority only for the point that the United States is liable for its own intrusions and

takings, not for those of others. There is nothing decided, said, or even intimated in that case which would indicate that by the language of Article I of the treaties of 1866 the Government intended to subject itself to a suit for damages for alleged wrongs inflicted by third parties upon these tribes.

II

THE UNITED STATES, UNDER THE ACT OF FEBRUARY 28, 1902, DID NOT UNDERTAKE TO BE LIABLE FOR SUMS WHICH MIGHT BE DUE THE INDIANS FROM THE RAILROADS

Petitioners contend (Br. 24–29) that since the railroads failed to pay them compensation for land taken for rights of way and did not pay to the Secretary of the Interior the annual charge of $15[1] per mile of railroad constructed, as required by Sections 15 and 16 of the Act of February 28, 1902, it became the duty of the United States to collect these sums and that the Government is liable to the appellants for its failure to do so. This contention is without merit. Nowhere does it appear in this statute that the United States undertook to collect these amounts or to be liable to the Indians for failure to do so. The naming in Section 16 of

[1] An Opinion of the Secretary of Interior (38 L. D. 414, 417 (1910)) ruled that liability of the railroads to pay this annual charge ceased upon admission of Oklahoma to statehood. The Secretary stated that the charge, "in the nature of a franchise tax or charge upon the business of the corporation constructing the road" payable to the nations, was exacted by Congress at a time when there was no state or territorial government and that Congress intended it to be paid to the nations only while they were exercising the func-

the Secretary of the Interior as a depositary for the payment of the annual mileage charge was not coupled with a promise to be liable for these sums if they were not paid to that officer. This Court has held that the exercise by Congress of its plenary power over Indians "does not necessarily involve the assumption of contractual obligations by the government. Their assumption is not to be presumed in the absence of any action taken by the government or on its behalf indicating such

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tions of a political government. The Opinion required the railroads to pay the charges which had accrued on November 16, 1907, the date that the state was admitted.

Moreover, three suits have been brought recently on behalf of the Osage Indians seeking, first, to collect annual charges of $15 per mile of railroad constructed, allegedly due pursuant to Section 16 of the 1902 Act and, second, damages for the alleged use of portions of the rights of way for non-railroad purposes in contravention of Section 14 of the 1902 Act and Section 2 of the Act of March 2, 1899, (30 Stat. 990). Two of the cases held that the requirement for payment of the charges ceased upon the execution and delivery of allotment deeds to the Osage Indians in 1909 and that the rights of way had not been improperly used (*United States* v. *Midland Valley Railroad Co.*, United States District Court for the Northern District of Oklahoma, decided November 19, 1942, not reported; *United States* v. *Missouri, Kansas, Texas Railroad Co.*, United States District Court for the Northern District of Oklahoma, decided October 7, 1942, not reported). The third is pending, but, according to the United States Attorney, the district judge announced from the bench on August 31, 1942, that the defendant railroad would not be liable for the $15 charge because the road was constructed under the Act of 1899, the relevant section (sec. 5) of which applied only to the "Indian Territory" and excluded the Osage Reservation (*United States* v. *Sante Fe Railroad Co.*, pending, United States District Court for the Northern District of Oklahoma).

a purpose." *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421. Cf. *Turner* v. *United States*, 248 U. S. 354, 359. The assertion of petitioners (Br. 26) that "the Act of February 28, 1902 was an arrangement made by the United States directly with the railroads" is of no moment. A parallel situation existed in *United States* v. *Algoma Lumber Co.*, 305 U. S. 415.

III

SECTION 11 OF THE ACT OF APRIL 26, 1906, PROVIDING FOR THE COLLECTION BY A GOVERNMENT AGENT OF REVENUES DUE THE TRIBES, DOES NOT MAKE THE UNITED STATES LIABLE FOR SUMS WHICH THE AGENT FAILS TO COLLECT.

The 1906 Act was a comprehensive statute for the final disposition of the affairs of the Five Civilized Tribes, passed at a time when the dissolution of the tribal governments was believed to be imminent. *Tally* v. *Burgess*, 246 U. S. 104, 107; H. Rep. 183, 59th Cong., 1st sess. Section 11 provided that all revenues accruing to the Five Tribes "before or after dissolution of the tribal governments" should be collected by an officer appointed by the Secretary of the Interior. As a corollary he was authorized to pay lawful claims against the tribes. The action of Congress must be viewed as a means chosen for the exercise of the power of the Government to protect the rights of the Indians, in view of the expected dissolution of their Governments. The means were adapted to that end. Because of this prospective

dissolution, some provision was necessary for collecting revenues due the tribes and disbursing payments to persons with legitimate claims. The tribal governments being dissolved, there would be no tribal treasurers, and the effect of this provision was to substitute a treasurer appointed by the United States for those who were selected by the tribes and would no longer hold office. Section 11 was not a contract made with the Indians to collect all moneys owed the tribes but was simply an incidental part of the machinery for dissolution of the tribal governments. As such, it constituted only an intragovernmental direction to officers of the United States. Cf. *The Sac and Fox Indians*, 220 U. S. 481.

Surely Congress did not intend by Section 11 of the 1906 Act to make the Government liable for all moneys which its officers failed to collect, for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs. See *Robertson* v. *Sichel*, 127 U. S. 507, 515.

IV

SECTION 18 OF THE ACT OF APRIL 26, 1906, AUTHORIZING THE SECRETARY OF THE INTERIOR TO BRING SUITS ON BEHALF OF THE TRIBES, DOES NOT MAKE THE UNITED STATES LIABLE IN DAMAGES FOR HIS FAILURE TO BRING SUCH SUITS.

There can be no doubt that under the treaties of 1866 and the Acts passed pursuant thereto, providing for the acquisition by the railroads of

rights of way and station grounds, the tribes themselves were to take the steps necessary to protect their interests. For example, Section 10 of the Act of July 26, 1866, 14 Stat. 289, 291 (n. 1, *supra*), clearly contemplates that any negotiations looking toward the acquisition of lands by the railroads were to be conducted by the Indians. Similarly, the Act of 1902 provides a full and complete remedy in case of controversy between the Indians and the railroad companies in connection with the valuation of lands taken by the railroads for right of way and station purposes (sec. 15). In none of these treaties or statutes is the United States looked to as a party to the proceedings. Instead, it was intended that the tribes themselves would bring whatever suits were necessary to enforce their rights under the 1866 treaties and the 1902 Act.

Petitioners contend (Br. 29–30) that all this was changed by Section 18 of the Act of April 26, 1906, 34 Stat. 137, authorizing the Secretary of the Interior to bring suits to collect any money due or recover land belonging to any of the Five Civilized Tribes. This section is permissive and not compulsory, for it merely "authorizes" the Secretary of the Interior to bring suits on behalf of the tribes. It imposes no legal, mandatory duty on him, nor does it make the United States liable in damages for his failure to bring such suits. Cf. *Pine Hill Co.* v. *United States*, 259 U. S. 191, 196. If Congress had intended to make obliga-

tory the filing of a suit by the Secretary, it could easily have used language to have accomplished that purpose. "The courts may not supply the words which Congress omitted. Nor can such course be induced by any consideration of public policy or the desire to promote justice, if such would be its effect, in dealing with dependent people." *United States* v. *First National Bank*, 234 U. S. 245, 262.

The remedy of petitioners was to sue the railroads if they had a valid claim for injuries suffered as a result of unwarranted encroachment by the railroads on their property or for the failure of the railroads to pay for the land taken or to pay mileage fees. But petitioners contend that they were under the disability of being dependent wards of the Government with no power to bring suit and that the United States as their guardian should have sued for them (Br. 15, 30). However, the tribes are neither precluded by their wardship status nor by the 1902 and 1906 Acts from bringing suits on their own behalf. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 295.[8] In fact, Section 18 of the 1906 Act specifically recognized the ca-

[8] Tribal capacity to sue is implied in the various right of way statutes which permit appeals from administrative decisions on the amount of damages due for tribal property taken or damaged. *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641; see Section 15 of the 1902 Act.

pacity of these tribes to sue both before and after its enactment.[9]

V

THE COURT OF CLAIMS HAS NO JURISDICTION OF SUITS NOT BASED ON A TREATY OR STATUTORY OBLIGATION

For a controversy to be justiciable by virtue of the special jurisdictional Acts of 1924, under which these suits were brought, it must be one "arising under or growing out" of a treaty, agreement or Act of Congress.[10] Clearly, the quoted language means that the foundation of the suit must be based on a positive obligation incurred by the United States in a treaty, agreement or Act of Congress. Of such a nature were the claims involved in *Seminole Nation* v. *United States*, 316 U. S. 286. See also *United States* v. *Mil. Lac Chippewas*, 229 U. S. 498, 500; *United States* v.

[9] Section 18 provides in part:

> Where suit is *now pending, or may hereafter be filed* in any United States court in the Indian Territory, *by* or on behalf of *any one or more of the Five Civilized Tribes* * * *. [Italics supplied.]

[10] The Act of August 16, 1937, 50 Stat. 650, did not, as petitioners contend (Br. 21), extend the jurisdiction of the Court of Claims and make it unnecessary that claims presented by an amended petition must have an express foundation in treaties and Acts of Congress. That Act was passed to meet the holding of this Court in *United States* v. *Seminole Nation*, 299 U. S. 417, and by it no obligation was "undertaken by the United States beyond the provisions of the various original jurisdictional acts". Sen. Rep. 715, 75th Congress, 1st sess.; 81 Cong. Rec. 8007.

Old Settlers, 148 U. S. 427, 468, 469; *Delaware Tribe of Indians* v. *United States*, 84 C. Cls. 535, 539; *Klamath & Moadac Tribes* v. *United States*, 81 C. Cls. 79, 92–93, affirmed, 296 U. S. 244; *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494. To hold otherwise would lead to an absurd result, for any claim involving an Indian could be said to have its genesis in the fact that at some time Congress passed an Act or ratified a treaty bearing in some degree on the Indian engaged in suit.

It has been shown that there is no treaty or Act of Congress wherein the Government assumed liabilities of the character claimed. Petitioners therefore are remitted for a cause of action to an alleged duty cast upon the Government by reason of its relationship to them. The jurisdictional Acts, however, do not confer on the Court of Claims jurisdiction of causes of action "predicated upon the common law liabilities pertaining to the relationship of guardian and ward." *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494, 498.[11] Special jurisdictional Acts are to be strictly construed and implications as to jurisdiction under their terms is forbidden. *Blackfeather*

[11] "It is clear that this relationship [guardian and ward] does not exist between the United States and the Indians, although there are important similarities and suggestive parallels between the two relationships." Cohen, *Handbook of Federal Indian Law* (1942), p. 169.

v. *United States*, 190 U. S. 368; *Price* v. *United States and Osage Indians*, 174 U. S. 373. In the latter case this Court said (p. 375):

> The right of the plaintiff to recover is a purely statutory right. The jurisdiction of the Court of Claims cannot be enlarged by implication. It matters not what may seem to this court equitable, or what obligation we may deem ought to be assumed by the Government, or the Indian tribe, whose members were guilty of this depredation, we cannot go beyond the language of the statute and impose a liability which the Government has not declared its willingness to assume. * * *

Once a treaty or statutory obligation is established, equitable considerations may be adverted to looking toward the "moral obligations of the highest responsibility and trust" which the Government bears towards the Indians. *Seminole Nation* v. *United States*, 316 U. S. 286, 297. There must first be established, however, a treaty or statutory basis for those obligations, and the last-cited case proceeds upon that principle. If Congress has not seen fit to establish an obligation and specify the cases and contingencies in which the liability of the Government is submitted for judicial determination, the courts may not substitute their judgment for that of Congress, which has an absolute discretion over the liability of the United States to suit. *Schillinger* v. *United States*, 155 U. S. 163,

166. Questions as to the policy of the Government in its relationship with Indian tribes, their lands, and property are political and not judicially cognizable.

CONCLUSION

It is respectfully submitted, therefore, that the judgments of the Court of Claims dismissing the complaints for their failure to state causes of action against the United States and for want of jurisdiction are correct and should be affirmed.

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DECEMBER 1942.

APPENDIX

Articles I and V of the Treaty of March 21, 1866, 14 Stat. 755, 757–758, between the Seminole Nation and the United States provide:

> ARTICLE I. There shall be perpetual peace between the United States and the Seminole nation, and the Seminoles agree to be and remain firm allies of the United States, and always faithfully aid the government thereof to suppress insurrection and put down its enemies.
>
> The Seminoles also agree to remain at peace with all other Indian tribes, and with themselves. In return for these pledges of peace and friendship, the United States guarantee them quiet possession of their country, and protection against hostilities on the part of other tribes; and in the event of such hostilities, that the tribe commencing and prosecuting the same shall make just reparation therefor. Therefore the Seminoles agree to a military occupation of their country at the option and expense of the United States.
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> * * * * *
>
> ARTICLE V. The Seminole nation hereby grant a right of way through their lands to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point on their eastern to their western or southern boundary; but said railroad company, together with all its agents and employes, shall be subject to the

laws of the United States relating to the intercourse with Indian tribes, and also to such rules and regulations as may be prescribed by the Secretary of the Interior, for that purpose. And the Seminoles agree to sell to the United States, or any company duly authorized as aforesaid, such lands not legally owned or occupied by a member or members of the Seminole nation lying along the line of said contemplated railroad, not exceeding on each side thereof a belt or strip of land three miles in width, at such price per acre as may be eventually agreed upon between said Seminole nation and the party or parties building said road—subject to the approval of the President of the United States: *Provided, however,* That said land thus sold shall not be reconveyed, leased, or rented to, or be occupied by, any one not a citizen of the Seminole nation, according to its laws and recognized usages: *Provided, also,* That officers, servants, and employes of said railroad necessary to its construction and management shall not be excluded from such necessary occupancy, they being subject to the provisions of the Indian intercourse laws, and such rules and regulations as may be established by the Secretary of the Interior; nor shall any conveyance of said lands be made to the party building and managing said road, until its completion as a first-class railroad and its acceptance as such by the Secretary of the Interior.

Articles I and V of the Treaty of June 14, 1866, 14 Stat. 785, 786, 787–788, between the Creek Nation and the United States, provide:

ARTICLE I. There shall be perpetual peace and friendship between the parties

to this treaty, and the Creeks bind themselves to remain firm allies and friends of the United States, and never to take up arms against the United States, but always faithfully to aid in putting down its enemies. They also agree to remain at peace with all other Indian tribes; and, in return, the United States guarantees them quiet possession of their country, and protection against hostilities on the part of other tribes. In the event of hostilities, the United States agree that the tribe commencing and prosecuting the same, shall, as far as may be practicable, make just reparation therefor. To insure this protection, the Creeks agree to a military occupation of their country, at any time, by the United States, and the United States agree to station and continue in said country from time to time, at its own expense, such force as may be necessary for that purpose. * * *

* * * * * *

ARTICLE V. The Creek nation hereby grant a right of way through their lands, to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south of the Creek country, and likewise from any point on their eastern to their western or southern boundary, but said railroad company, together with all its agents and employees, shall be subject to the laws of the United States relating to intercourse with Indian tribes, and also to such rules and regulations as may be prescribed by the Secre-

tary of the Interior for that purpose, and the Creeks agree to sell to the United States, or any company duly authorized as aforesaid, such lands not legally owned or occupied by a member or members of the Creek nation, lying along the line of said contemplated railroad, not exceeding on each side thereof a belt or strip of land three miles in width, at such price per acre as may be eventually agreed upon between said Creek nation and the party or parties building said road, subject to the approval of the President of the United States: *Provided, however,* That said land thus sold shall not be reconveyed, leased, or rented to, or be occupied by any one not a citizen of the Creek nation, according to its laws and recognized usages: *Provided, also,* That officers, servants, and employes of said railroad necessary to its construction and management, shall not be excluded from such necessary occupancy, they being subject to the provisions of the Indian intercourse law and such rules and regulations as may be established by the Secretary of the Interior, nor shall any conveyance of any of said lands be made to the party building and managing said road until its completion as a first-class railroad, and its acceptance as such by the Secretary of the Interior.

Sections 13–16 of the Act of February 28, 1902, 32 Stat. 43, 47–49, provide:

SEC. 13. That the right to locate, construct, own, equip, operate, use, and maintain a railway and telegraph and telephone line or lines into, in, or through the Indian Territory, together with the right to take and condemn lands for right of way, depot grounds, terminals, and other railway pur-

poses, in or through any lands held by any Indian tribe or nation, person, individual, or municipality in said Territory, or in or through any lands in said Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any railway company organized under the laws of the United States, or of any State or Territory, which shall comply with this Act.

SEC. 14. That the right of way of any railway company shall not exceed one hundred feet in width except where there are heavy cuts and fills, when one hundred feet additional may be taken on each side of said right of way; but lands additional and adjacent to said right of way may be taken and condemned by any railway company for station grounds, buildings, depots, side tracks, turnouts, or other railroad purposes not exceeding two hundred feet in width by a length of two thousand feet. That additional lands not exceeding forty acres at any one place may be taken by any railway company when necessary for yards, round-houses, turntables, machine shops, water stations, and other railroad purposes. And when necessary for a good and sufficient water supply in the operation of any railroad, any such railway company shall have the right to take and condemn additional lands for reservoirs for water stations, and for such purpose shall have the right to impound surface water or build dams across any creek, draw, canyon, or stream, and shall have the right to connect the same by pipe line with the railroad and take the necessary grounds for such pur-

poses; and any railway company shall have the right to change or straighten its line, reduce its grades or curves, and locate new stations and to take the lands and right of way necessary therefor under the provisions of this Act.

SEC. 15. That before any railroad shall be constructed or any lands taken or condemned for any of the purposes set forth in the preceding section, full compensation for such right of way and all land taken and all damage done or to be done by the construction of the railroad, or the taking of any lands for railroad purposes, shall be made to the individual owner, occupant, or allottee of such lands, and to the tribe or nation through or in which the same is situated: *Provided*, That correct maps of the said line of railroad in sections of twenty-five miles each, and of any lands taken under this Act, shall be filed in the Department of the Interior, and shall also be filed with the United States Indian agent for Indian Territory, and with the principal chief or governor of any tribe or nation through which the lines of railroad may be located or in which said lines are situated.

In case of the failure of any railway company to make amicable settlement with any individual owner, occupant, allottee, tribe, or nation for any right of way or lands or improvements sought to be appropriated or condemned under this Act, all compensation and damages to be paid to the dissenting individual owner, occupant, allottee, tribe, or nation by reason of the appropriation and condemnation of said right of way, lands, or improvements shall be determined by the appraisement of three disinterested referees, to be appointed by the judge of the United States court, or other court of juris-

diction in the district where such lands are situated, on application of the corporation or other person or party in interest. Such referees, before entering upon the duties of their appointment shall each take and subscribe, before competent authority, an oath that he will faithfully and impartially discharge the duties of his appointment, which oaths, duly certified, shall be returned with the award of the referees to the clerk of the court by which they were appointed. The referees shall also find in their report the names of the person and persons, tribe, or nation to whom the damages are payable and the interest of each person, tribe, or nation in the award of damages. Before such referees shall proceed with the assessment of damages for any right of way or other lands condemned under this Act, twenty days' notice of the time when the same shall be condemned shall be given to all persons interested, by publication in some newspaper in general circulation nearest said property in the district where said right of way or said lands are situated, or by ten days' personal notice to each person owning or having any interest in said lands or right of way: *Provided*, That such notice to any tribe or nation may be served on the principal chief or governor of the tribe. If the referees can not agree, then any two of them are authorized to and shall make the award. Any party to the proceedings who is dissatisfied with the award of the referees shall have the right, within ten days after the making of the award, to appeal, by original petition, to the United States court, or other court of competent jurisdiction, sitting at the place nearest and most convenient to the property sought to be taken, where the question of the damages occa-

sioned by the taking of the lands in controversy shall be tried de novo, and the judgment rendered by the court shall be final and conclusive, subject, however, to appeal as in other cases.

When the award of damages is filed with the clerk of the court by the referees, the railway company shall deposit the amount of such award with the clerk of the court, to abide the judgment thereof, and shall then have the right to enter upon and take possession of the property sought to be condemned: *Provided*, That when the said railway company is not satisfied with the award, it shall have the right, before commencing construction, to abandon any portion of said right of way and adopt a new location, subject, however, as to such new location, to all the provisions of this Act. Each of the referees shall receive for his compensation the sum of four dollars per day while actually engaged in the appraisement of the property and the hearing of any matter submitted to them under this Act. Witnesses shall receive the fees and mileage allowed by law to witnesses in courts of record within the districts where such lands are located. Costs, including compensation of the referees, shall be made part of the award or judgment and be paid by the railway company: *Provided*, That if any party or person other than the railway company shall appeal from any award, and the judgment of the court does not award such appealing party or person more than the referees awarded, all costs occasioned by such appeal shall be paid by such appealing party or person.

SEC. 16. That where a railroad is constructed under the provisions of this Act there shall be paid by the railway company

to the Secretary of the Interior, for the benefit of the particular tribe or nation through whose lands any such railroad may be constructed, an annual charge of fifteen dollars per mile for each mile of road constructed, the same to be paid so long as said lands shall be owned and occupied by such nation or tribe, which payment shall be in addition to the compensation otherwise provided herein; and the grants herein are made upon the condition that Congress hereby reserves the right to regulate the charges for freight and passengers on said railways and messages on all telegraph and telephone lines until a State government or governments shall exist in said Territory within the limits of which any railway shall be located; and then such State government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights within their respective limits by such railways; but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railways whenever such transportation shall extend from one State into another, or shall extend into more than one State; and that the railway companies shall carry the mail at such prices as Congress may by law provide; and until such rate is fixed by law the Postmaster-General may fix the rate of compensation.

Sections 11 and 18 of the Act of April 26, 1906, 34 Stat. 137, 141, 144, provide:

SEC. 11. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer ap-

pointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. All such claims arising before dissolution of the tribal governments shall be presented to the Secretary of the Interior within six months after such dissolution, and he shall make all rules and regulations necessary to carry this provision into effect and shall pay all expenses incident to the investigation of the validity of such claims or indebtedness out of the tribal funds: *Provided,* That all taxes accruing under tribal laws or regulations of the Secretary of the Interior shall be abolished from and after December thirty-first, nineteen hundred and five, but this provision shall not prevent the collection after that date nor after dissolution of the tribal government of all such taxes due up to and including December thirty-first, nineteen hundred and five, and all such taxes levied and collected after the thirty-first day of December, nineteen hundred and five, shall be refunded.

* * * * *

SEC. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the

tribal governments, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits: *Provided*, That proceedings to which any of said tribes is a party pending before any court or tribunal at the date of dissolution of the tribal governments shall not be thereby abated or in anywise affected, but shall proceed to final disposition.

Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him.

Section 1 of the Seminole jurisdictional Act of May 20, 1924, 43 Stat. 133, provides:

* * * That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any Act of Congress in re-

lation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

Section 1 of the Creek jurisdictional Act of May 24, 1924, 43 Stat. 139, provides:

> * * * That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States: *Provided, however,* That the provisions of this Act shall not be construed to confer jurisdiction upon the court to hear, examine, consider, and adjudicate any balance claimed to be due on the so-called Loyal Creek claim, or any amount claimed to be due to equalize allotments among members of the Creek Tribe.

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Nos. 321, 322

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE CREEK NATION, PETITIONER

v.

THE UNITED STATES

THE SEMINOLE NATION, PETITIONER

v.

THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

ADDITIONAL MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 321

THE CREEK NATION, PETITIONER

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No. 322

THE SEMINOLE NATION, PETITIONER

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THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

ADDITIONAL MEMORANDUM FOR THE UNITED STATES

At the conclusion of the oral argument in the above cases Mr. Justice Frankfurter asked counsel—

> * * * to refer to other legislation dealing with Indian lands, of any tribe, where Congress has dealt with the question of trespass to Indian lands and the obligations growing out of such wrongs—by whom and for whom the suits would be brought.

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The stated purpose of the inquiry was to ascertain whether Congress had adopted "a uniform policy" in dealing with trespasses to Indian lands.

We have made a careful examination of the statutes and treaties relating to Indian affairs and set forth below the relevant provisions. It must be emphasized, however, that the statutory provisions are gathered from a century of Indian legislation, and that the occasional treaty clauses bearing upon the point are scattered instances drawn from hundreds of treaties containing no such commitments. Moreover, the situation of the various Tribes differed greatly and the treaties were negotiated by a large number of men over a long period of time. For these reasons, it is clear that the scattered provisions which we have found cannot be said to represent any settled policy with respect to remedies for intrusions upon Indian lands. However, we have collected the provisions most nearly relevant in order that the Court may have before it those statutory and treaty provisions which deal affirmatively with the protection of Indian lands and remedies for intrusions.

1. STATUTES

The United States has always respected the possessory rights of Indian tribes to their lands, but such rights have never been thought to include the power to require the United States to bring suits in the Indians' behalf or respond in damages for the trespasses of third persons. Rather, as

stated in Cohen, *Handbook of Federal Indian Law* (1934) p. 306:

> Tribal possessory right may be defined as a power to command the aid of the law against trespassers, coupled with a privilege to use reasonable force in excluding such trespassers. * * *

The tribal possessory right did not differ in essence from the right of any citizen to look to the aid of the government to protect his property. It did not include the additional right to require the government to respond in damages for failure to grant adequate protection, a right which the ordinary citizen does not have against the government. See cases collected in *Nez Perce Tribe of Indians* v. *United States*, 95 C. Cls. 1, 10, certiorari denied, 316 U. S. 686.

To prevent intrusions on Indian lands Congress frequently enacted criminal statutes some of which punish trespasses generally and others of which proscribed particular kinds of trespasses. Cohen, *loc. cit. supra*. Section 11 of the Act of June 30, 1834, 4 Stat. 730 (which became Rev. Stat. 2118) is an example of the former class. It provided:

> Every person who makes a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of $1,000. The President may, moreover, take such measures and em-

> ploy such military force as he may judge necessary to remove any such person from the lands.[1]

An example of a statute punishing a particular kind of trespass is Section 18 of the Act of June 30, 1902, 32 Stat. 500, which ratified a supplemental agreement with the Creek Tribe of Indians:

> Any person who shall introduce any cattle into the Creek Nation in violation of the provisions of this section shall be deemed guilty of a misdemeanor and punished by a fine of not less than $100, and shall stand committed until such fine and costs are paid, such commitment not to exceed one day for every $2 of said fine and costs; and every day said cattle are permitted to remain in said nation without a permit for their introduction having been obtained shall constitute a separate offense.

The duty of preventing violations of such statutes fell, of course, upon the Executive Department just as does the enforcement of all criminal laws, including those for the protection of property. It was recognized that agents might be appointed, and the Army used, for that purpose. See *United States* v. *Crook*, 179 Fed. 391; *United States* v. *Mullin*, 71 Fed. 682.

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[1] In *United States* v. *Joseph*, 94 U. S. 614, the Court held that the lands of the Pueblo Indians were not within the meaning of the above Act because those Indians held their lands by a right superior to that of the United States, their title dating back to grants made by the Government of Spain before the Mexican Revolution.

Although Congress thus undertook by penal laws to grant the Indians that protection normally given to all private property, it never directed the Executive Department to enforce civil remedies on behalf of the Indians against trespassers[2] or assumed liability for the damages. Neither did Congress enact any legislation authorizing the Indians themselves to pursue civil remedies in the courts.[3] The explanation of the failure to enact legislation dealing with civil remedies is uncertain but it may be that Congress believed that the Indians could prosecute their own suits if they desired. Even in the absence of statute, trespass would lie on an Indian title (see *Marsh* v. *Brooks*, 8 How. 223, 232); and it seems that the various Tribes as well as individual Indians had standing to sue (see Supplemental Memorandum for the United States herein). Thus,

[2] But compare the Act of July 13, 1832, 4 Stat. 576, which contained a provision in Section 2 thereof that:

"* * * the Secretary of War be directed to endeavour to ascertain the names of the persons who committed the depredations upon the property of said Indians [certain Cherokees who had lost stock by spoliation committed by citizens of the United States], and take suitable steps for the prosecution and punishment of such persons; *and also for the recovery of the value of the property plundered or destroyed by them.*" [Italics supplied.]

[3] Section 18 of the Act of June 30, 1902, *supra*, provided that if cattle trespassed upon allotted lands, the owner of the cattle should pay damages to the owner of the lands for the initial trespass and double damages for each subsequent trespass. The Act does not provide how the damages shall be recovered.

in *United States* v. *Joseph*, 94 U. S. 614, 619, Mr. Justice Miller said, speaking for the Court:

> If the defendant is on the lands of the pueblo, without the consent of the inhabitants, he may be ejected, or punished civilly by a suit for trespass, according to the law regulating such matters in the Territory. * * *

And in the case of *Smith* v. *Mosgrove*, 51 Ore. 495, it was held that an Indian might bring an action in the state courts for trespass upon real property which had been allotted to him. The court reasoned that although the Indians were under the protection of the treaties and laws of Congress, their property withdrawn from the operation of state laws, and state courts without jurisdiction over controversies concerning title to Indian allotments, yet it did not follow that an Indian alloftee might not invoke the aid of a state court for protection or enforcement of his personal property rights when invaded by a white person. The court said (p. 972):

> He could not sue in the federal court on the ground of diverse citizenship (*Felix* v. *Patrick*, 145 U. S. 317, 12 Sup. Ct. 862, 36 L. Ed. 719) and his case might not come within federal jurisdiction by reason of the questions involved. It is true that by Sections 2118, 2119, 2124, U. S. Rev. St., the duty and obligation is imposed upon the executive branch of the government to protect Indians residing on a reservation in the possession and occupancy of their land, and

to take such measures and employ such force as may be necessary for that purpose: *United States* v. *Mullin* (D. C.), 71 Fed. 682. But this affords no remedy to the Indian for an injury to his personal or property rights; and he cannot obtain relief therefor through the executive department. This he must do through some court of competent jurisdiction.

The action of trespass does not necessarily involve the question of title (*Newcombe* v. *Irwin*, 55 Mich. 620, 22 N. W. 66), and a trial thereof will not interfere with any of the rights given to the secretary of the interior or the federal court over the Indian or his land.

In the case of the Five Civilized Tribes (two of which were the Creek and Seminole Nations) there is affirmative evidence that Congress believed the Tribes to be competent to manage their civil remedies for trespasses on their lands. Statutes granting powers of eminent domain to railroad companies often provided that the proceedings for the determination of just compensation should have as parties the Indians and the railroads without the intervention of the United States. An example is Section 15 of the Act of February 28, 1902, 32 Stat. 43, 47–48, which is involved in this case. It provided in part:

In case of the failure of any railway company to make amicable settlement with any individual owner, occupant, allottee, tribe, or nation for any right of way or

lands or improvements sought to be appropriated or condemned under this Act, all compensation and damages to be paid to the dissenting individual owner, occupant, allottee, tribe, or nation by reason of the appropriation and condemnation of said right of way, lands, or improvements shall be determined by the appraisement of three disinterested referees, to be appointed by the judge of the United States court, or other court of jurisdiction in the district where such lands are situated, on application of the corporation or other person or party in interest. * * * The referees shall also find in their report the names of the person and persons, tribe, or nation to whom the damages are payable and the interest of each person, tribe, or nation in the award of damages. Before such referees shall proceed with the assessment of damages for any right of way or other lands condemned under this Act, twenty days' notice of the time when the same shall be condemned shall be given to all persons interested, * * *: *Provided*, That such notice to any tribe or nation may be served on the principal chief or governor of the tribe. If the referees can not agree, then any two of them are authorized to and shall make the award. Any party to the proceedings who is dissatisfied with the award of the referees shall have the right, within ten days after the making of the award, to appeal, by original petition, to the United

> States court, or other court of competent jurisdiction, sitting at the place nearest and most convenient to the property sought to be taken, * * *.

See also *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641.

Even more significant is the Curtis Act of June 28, 1898, 30 Stat. 495, which was enacted "for the protection of the people of the Indian territory" (including the Creek and Seminole Nations). It provided:

> SEC. 2. That when in the progress of any civil suit, either in law or equity, pending in the United States court in any district in said Territory, it shall appear to the court that the property of any tribe is in any way affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit by service upon the chief or governor of the tribe, and the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action.

Other sections refer to actions by "any tribe or person."

This statute was involved in *Hargrove* v. *Cherokee Nation*, 129 Fed. 186, and *Brought* v. *Cherokee Nation*, 129 Fed. 192. It shows that Congress believed that the Five Civilized Tribes were competent to pursue civil remedies for trespasses to their lands and thus is a strong indication that Congress never intended the burden to rest

as a legal or equitable obligation upon the United States.[4]

2. TREATIES

We have found no treaty provision relevant to a consideration of the right of Indian tribes to invoke civil remedies against intruders upon tribal lands. *In one instance only* has the United States stipulated that it would pursue civil remedies on behalf of an Indian tribe. In Article III of the Treaty of May 24, 1834, with the Chickasaws, it was provided (7 Stat. 450):

> ART. III. The Chickasaws are not acquainted with the laws of the whites, which are extended over them; and the many in-

[4] Compare the Act of February 19, 1875, 18 Stat. 330, which authorized the Seneca Nation of New York Indians to lease lands within certain reservations and confirmed existing leases. Sections 6 and 7 provided:

"SEC. 6. That all moneys arising from rents under the provisions of this act which shall belong to said Seneca Nation shall be paid to and recoverable by the treasurer of said Seneca Nation, and expended in the same manner and for the same purposes as are other revenues or moneys belonging to said Seneca Nation.

"SEC. 7. That the courts of the State of New York within and for the county of Cattaraugus, having jurisdiction in real actions, and the circuit and district courts of the United States in and for the northern district of said State, shall have jurisdiction of all actions for the recovery of rents and for the recovery of possession of any real property within the limits of said villages, whether actions of debt, ejectment, or other forms of action, according to the practice in said courts; and actions of forcible entry and detainer, or of unlawful detainer arising in said villages, may be maintained in any of the courts of said county which have jurisdiction of such actions."

truders which break into their country, interupting their rights and disturbing their repose, leave no alternative whereby restraint can be afforded, other than an appeal to the military force of the country, which they are unwilling to ask for, or see resorted to; and therefore they agree to forbear such a request, for prevention of this great evil, with the understanding, which is admitted, that *the agent of the United States, upon the application of the chiefs of the nation, will resort to every legal civil remedy,* (at the expense of the United States,) *to prevent intrusions upon the ceded country; and to restrain and remove trespassers from any selected reservations, upon application of the owner of the same.* And it is also agreed, that the United States, will continue some discreet person as agent, such as they now have, to whom they can look for redress of wrongs and injuries which may be attempted against them; *and it is consented, that if any of their property, be taken by persons of the United States, covertly or forcibly, the agent on satisfactory and just complaint being made, shall pursue all lawful civil means, which the laws of the State permit, in which the wrong is done, to regain the same, or to obtain a just remuneration;* and on failure or inability to procure redress, for the offended, against the offending party; payment for the loss sustained, on production of the record, and certificate of the facts, by the agent, shall be made by the United States; but in all

such cases, satisfactory proof, for the establishing of the claim, shall be offered. [Italics added.]

Illustrative of the provisions of early treaties is Article IV of the Treaty of January 10, 1786 with the Chickasaws, which provided (7 Stat. 24):

> If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands hereby allotted to the Chickasaws to live and hunt on; such person shall forfeit the protection of the United States of America, and the Chickasaws may punish him or not as they please.

But this policy of turning trespassers over to the Indians seems to have been followed for the most part before the United States recognized that it owed the same kind of governmental obligation to protect Indian property as it owed to citizens.

In some of the subsequent treaties that governmental obligation was expressly stated. The form of the stipulation varied from treaty to treaty as did the extent of the obligation. The following excerpts, however, are fairly illustrative:

1. Cherokee Treaty of July 8, 1817, 7 Stat. 156.

> ART. 12. The United States do also bind themselves to prevent the intrusion of any of its citizens within the lands ceded by the first and second articles of this treaty, until the same shall be ratified by the President and Senate of the United States, and duly promulgated.

2. Quapaw Treaty of August 24, 1818, 7 Stat. 176.

ART. 4. No citizen of the United States, or any other person, shall be permitted to settle on any of the lands hereby allotted to, and reserved for, the said Quapaw tribe or nation, to live and hunt on; yet it is expressly understood and agreed on, by, and between, the parties aforesaid, that, at all times, the citizens of the United States shall have the right to travel and pass freely, without toll or exaction, through the Quapaw reservation, by such roads or routes as now are, or hereafter may be, established.

* * * * *

ART. 6. Least the friendship which now exists between the United States and the said tribe or nation, should be interrupted by the misconduct of individuals, it is hereby agreed, that, for injuries done by individuals, no private revenge or retaliation shall take place; but, instead thereof, complaints shall be made by the party injured, to the other; by the tribe or nation aforesaid, to the governor, superintendent of Indian affairs, or some other person authorized and appointed for that purpose; and by the governor, superintendant, or other person authorized, to the chiefs of the said tribe or nation. And it shall be the duty of the said tribe or nation, upon complaint being made, as aforesaid, to deliver up the person or persons, against whom the complaint is made, to the end that he or they may be punished, agreeably to the laws

of the state or territory where the offence may have been committed;

3. Kickapoo Treaty of July 30, 1819, 7 Stat. 200. Article 7 of that treaty reads:

> ART. 7. The United States promise to guaranty to the said tribe the peaceable possession of the tract of land hereby ceded to them, and to restrain and prevent all white persons from hunting, settling, or otherwise intruding upon it. But any citizen or citizens of the United States, being lawfully authorized for that purpose, shall be permitted to pass and repass through the said tract, and to navigate the waters thereof, without any hindrance, toll, or exaction, from the said tribe.

4. Chickasaw Treaty of October 20, 1832, 7 Stat. 381.

> ARTICLE XV. The Chickasaws request that no persons be permitted to move in and settle on their country before the land is sold. It is therefore agreed, that no person, whatsoever, who is not Chickasaw or connected with the Chickasaws by marriage, shall be permitted to come into the country and settle on any part of the ceded lands until they shall be offered for sale, and then there shall not be any person permitted to settle on any of the land, which has not been sold, at the time of such settlement, and in all cases of a person settling on any of the ceded lands contrary to this express under-

standing, they will be intruders, and must be treated as such, and put off of the lands of the nation.

5. The Cherokee Treaty of July 19, 1866, 14 Stat. 799, contained a guarantee of quiet and peaceable possession and a promise that the Indians would be protected against intrusions by citizens of the United States.

> ARTICLE 26. The United States guarantee to the people of the Cherokee Nation the quiet and peaceable possession of their country and protection against domestic feuds and insurrections and against hostilities of other tribes. They shall also be protected against interruptions or intrusion from all unauthorized citizens of the United States who may attempt to settle on their lands or reside in their territory. In case of hostilities among the Indian tribes, the United States agree that the party or parties commencing the same shall, so far as practicable, make reparation for the damages done.

It will be observed that in this Treaty the promise of protection against intrusions is made in addition to the guarantee of quiet and peaceful possession. The treaty was negotiated at Fort Smith, Arkansas, at the same time as the Creek and Seminole treaties involved in the instant case and contrasts significantly with them; for the latter treaties contain no promise to prevent intrusions upon Creek or Seminole country.

In other treaties the expression of the governmental obligation to recognize the possession of the Indians has been coupled with a promise that the Indian agent or other officials would remove intruders from the land. Such provisions are found in the following treaties:

1. Sac and Fox Treaty of November 3, 1804 (7 Stat. 84):

> ART. 6. If any citizen of the United States or other white person should form a settlement upon lands which are the property of the Sac and Fox tribes, upon complaint being made thereof to the superintendant or other person having charge of the affairs of the Indians, such intruder shall forthwith be removed.

2. Cherokee Treaty of February 27, 1819 (7 Stat. 195):

> ART. 5. It is agreed * * * that all white people who have intruded, or may hereafter intrude, on the lands reserved for the Cherokees, shall be removed by the United States, and proceeded against according to the provisions of the act passed thirtieth March, eighteen hundred and two, entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers."

The act referred to was the fifth Indian intercourse act, 2 Stat. 139, 141, which stated the terms on which citizens of the United States might go

upon Indian land, and included penalties for violation of the requirements.

3. Creek Treaty of March 24, 1832 (7 Stat. 366):

> ARTICLE V. All intruders upon the country hereby ceded shall be removed therefrom in the same manner as intruders may be removed by law from other public land until the country is surveyed, and the selections made; excepting however from this provision those white persons who have made their own improvements, and not expelled the Creeks from theirs. Such persons may remain 'till their crops are gathered. After the country is surveyed and the selections made, this article shall not operate upon that part of it not included in such selections. But intruders shall, in the manner before described, be removed from these selections for the term of five years from the ratification of this treaty, or until the same are conveyed to white persons.

4. Choctaw and Chickasaw Treaty of June 22, 1855 (11 Stat. 611):

> ARTICLE 7. So far as may be compatible with the constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits; excepting, however, all persons

with their property, who are not by birth, adoption, or otherwise citizens or members of either the Choctaw or Chickasaw tribe, and all persons, not being citizens or members of either tribe, found within their limits, shall be considered intruders, and be removed from, and kept out of the same, by the United States agent, assisted if necessary by the military, with the following exceptions, viz: Such individuals as are now, or may be in the employment of the government, and their families; those peacefully travelling, or temporarily sojourning in the country or trading therein, under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws, with the assent of the United States agent, to reside within their limits, without becoming citizens or members of either of said tribes.

5. Creek Treaty of August 7, 1856 (11 Stat. 699):

ARTICLE 15. So far as may be compatible with the constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits; excepting, however, all white persons, with their property, who are not, by adoption or otherwise, members of either the Creek or Seminole tribe; and all persons not being members of either tribe, found

> within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States agents for said tribes, respectively; (assisted, if necessary, by the military;) with the following exceptions, viz: such individuals with their families as may be in the employment of the government of the United States; all persons peaceably travelling, or temporarily sojourning in the country, or trading therein under license from the proper authority of the United States; and such persons as may be permitted by the Creeks or Seminoles, with the assent of the proper authorities of the United States, to reside within their respective limits without becoming members of either of said tribes.

In a number of cases, Indian tribes have sought to recover from the United States for damages done by trespassers, basing their assertion of liability upon treaty stipulations like those illustrated above. The courts have always held, however, that such stipulations are political expressions of the recognized governmental obligation and do not assume a contractual liability to prevent the tort or respond in damages. *Pawnee Tribe* v. *United States,* 56 Ct. Cl. 1; *Blackfeet et al. Nations* v. *United States,* 81 Ct. Cl. 101; *Nez Perce Tribe of Indians* v. *United States,* 95 Ct. Cl. 1, certiorari denied 316 U. S. 686; cf. *Leighton* v. *United States,* 161 U. S. 291.

Moreover, when the treaty-making authority has been willing to assume responsibility for the

wrongs of third persons, the obligation has been expressly set forth. Such provisions are found in the following treaties:

1. Creek Treaty of January 24, 1826 (7 Stat. 286):

ARTICLE 13

> The United States agree to guarantee to the Creeks all the country, not herein ceded, to which they have a just claim, and to make good to them any losses they may incur in consequence of the illegal conduct of any citizen of the United States within the Creek country.

2. Choctaw and Chickasaw Treaty of June 22, 1855 (11 Stat. 611):

> ARTICLE 14. The United States shall protect the Choctaws and Chickasaws from domestic strife, from hostile invasion, and from aggression by other Indians and white persons not subject to their jurisdiction and laws; and for all injuries, resulting from such invasion or aggression, full indemnity is hereby guaranteed to the party or parties injured, out of the treasury of the United States, upon the same principle and according to the same rules upon which white persons are entitled to indemnity for injuries or aggressions upon them, committed by Indians.

See 17 Op. A. G. 134; 18 Op. A. G. 34.

3. Creek Treaty of August 7, 1856 (11 Stat. 699):

ARTICLE 18. The United States shall protect the Creeks and Seminoles from domestic strife, from hostile invasion, and from aggression by other Indians and white persons, not subject to their jurisdiction and laws; and for all injuries resulting from such invasion or aggression, full indemnity is hereby guaranteed to the party or parties injured out of the treasury of the United States, upon the same principle and according to the same rules upon which white persons are entitled to indemnity for injuries or aggressions upon them, committed by Indians.

4. Kiowa and Comanche Treaty of October 21, 1867, 15 Stat. 581:

ARTICLE 1. From this day forward all war between the parties to this agreement shall forever cease.

The government of the United States desires peace, and its honor is here pledged to keep it. The Indians desire peace, and they now pledge their honor to maintain it. If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Wash-

ington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, *and also reimburse the injured person for the loss sustained.* [Italics supplied.]

A similar provision is found in the treaties concluded with the Cheyenne and Arapaho dated October 28, 1867, 15 Stat. 593; Utes, March 2, 1868, 15 Stat. 619; Sioux, April 29, 1868, 15 Stat. 635; Crows, May 7, 1868, 15 Stat. 649; Navajo, June 1, 1868, 15 Stat. 667; and Shoshone, July 3, 1868, 15 Stat. 673.

The Creek and Seminole Treaties involved in the instant case (which superseded all previous treaties with these tribes) contain no provision corresponding to those quoted above. The omission of any such undertaking is persuasive that it was not intended that the United States should be legally liable for the wrongs done by intruders upon the Creek and Seminole country.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 321.

THE CREEK NATION, *Petitioner*,

v.

THE UNITED STATES.

No. 322.

THE SEMINOLE NATION, *Petitioner*,

v.

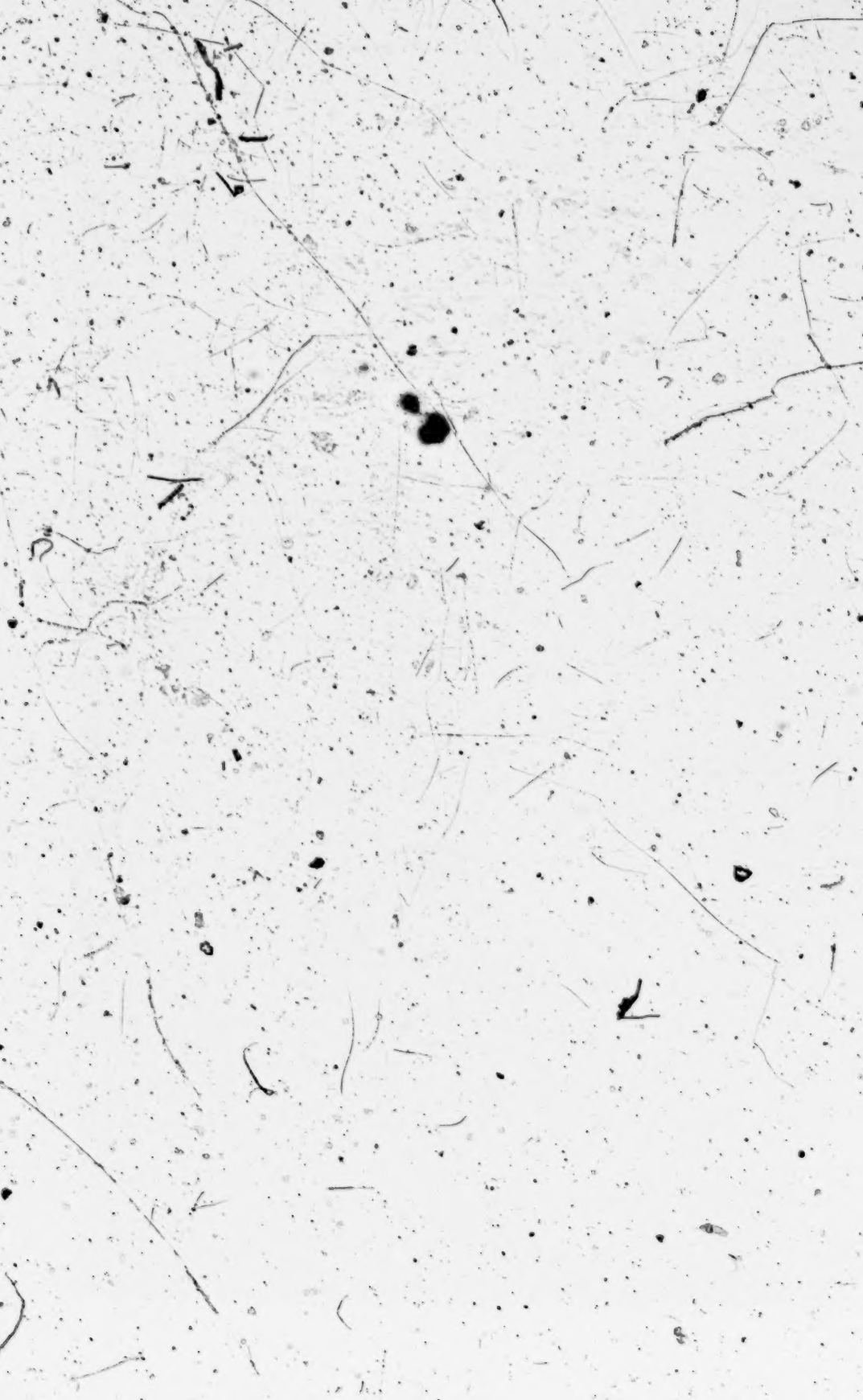
THE UNITED STATES.

On Writs of Certiorari to the Court of Claims.

PETITION FOR REHEARING.

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Counsel for Petitioners.

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IN THE

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THE CREEK NATION, *Petitioner*,

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THE SEMINOLE NATION, *Petitioner*,

v.

THE UNITED STATES.

On Writs of Certiorari to the Court of Claims.

PETITION FOR REHEARING.

The Creek and Seminole Nations of Indians, by counsel, respectfully petition this Honorable Court for a rehearing of the above entitled cause, on the following points set forth in the majority opinion of April 5, 1943:

1. That the covenant of quiet possession contained in the Creek and Seminole treaties of 1866 does not by necessary implication give rise to an action for damages for losses incurred by the breach of same by the United States, the contracting party and the guardian of petitioners;

2. That the tribes have a general legal right to sue in the courts of the United States to protect their own interests in the absence of legislative authority giving them that right; and that having such right, these Indian wards were expected to assume the burden of protecting their own interests while under the guardianship of the United States.

We will discuss briefly these points in the order of their statement.

1.

The jurisdictional acts of May 20, 1924, c. 162, 43 Stat. 133, and May 24, 1924, c. 181, 43 Stat. 139, authorize the Creek and Seminole Nations of Indians to adjudicate all legal and equitable claims arising under or growing out of treaties, agreements and acts of Congress, which said tribes may have against the United States. The Act of August 16, 1937, c. 651, 50 Stat. 650, provides for the adjudication of all legal and equitable claims presented by amended petition on file in the Court of Claims at the time this act was passed. The petitions were then on file. When Congress passed these jurisdictional acts, it did not limit the right of petitioners to sue solely upon claims wherein the United States had expressly promised indemnity for violations of its treaty obligations. But all legal and equitable principles were made available to petitioners in the presentation of their claims.

The basis for all liability, both legal and equitable, is a violation of a right which arises either by contract or by virtue of a duty owed by one party to another. For the resulting loss the law provides reparation usually in the form of damages. The recovery of damages is not made contingent upon the wishes of the party violating the right, but the law independently imposes the liability upon the party violating the right.

Does not the majority opinion make the right of petitioners to recover contingent upon the promise of the wrongdoer to pay, and overlook the obligations imposed by the *law* upon him?

The Creek and Seminole treaties of 1866 provide that "the United States guarantees them quiet possession of their country." With respect to this guarantee, which the demurrer admits was violated by the United States, the Court states as follows (Op. p. 3):

> "We conclude that, whether or not the guarantee is limited to military protection this language did not obligate the United States to compensate the tribes for encroachments by railroads acting under color of right. Keeping the peace and protecting the Indians was a difficult, and at times almost impossible, task, and we cannot assume that the government meant to guarantee reparations for breach of quiet possession without a single explicit word in the Treaty to that effect."

Would it have been a difficult matter for the administrative officers to order the railroads to give up Indian lands which they had never used for railroad purposes? As all of these railroads were directly supervised by the officers of the United States and all of the arrangements with said railroads were made directly with the United States we submit that such administrative action would have brought about the desired result, and the interests of these Indian wards would have been amply protected.

Does not the above conclusion of the majority of the court make the right of recovery for a wrong depend entirely upon the wishes of the wrongdoer? If the Government makes a solemn treaty promise to its dependent Indian wards, and it violates that promise, and causes loss to the estate of its ward, then the loss cannot be requited because the wrongdoer did not agree that it would pay damages for the treaty violation. This is not true in other cases, and we submit that it is a rule wholly foreign to legal and equitable jurisprudence. In fact, one of the maxims of Equity is that "Equity will not suffer a wrong without a remedy". Does not the above quoted conclusion set up the Government as a privileged party in litigation, irrespective of the principle that when the Government consents to be sued it comes into court as a common litigant?

Certainly in any suit by the ward against the guardian, recovery is not made contingent upon the showing that the guardian promised to indemnify the ward for losses caused by the guardian's failure to do his duty with respect to the trust estate. Nor do we believe that in any suit on a simple contract that it is necessary to establish anything more than the promise or duty created by the contract and a breach thereof resulting in loss, in order to recover damages. Surely recovery is not made contingent upon the promise of the wrongdoer that he will indemnify the injured party in case the duty is breached. We submit that the law, imposes the liability, and the recovery of damages is not contingent upon the promise of the wrongdoer to pay.

The guarantee of quiet possession was made to an unlettered people and is to be construed in the manner in which it would naturally be understood by them. It meant more to them than the money consideration provided by the treaty. The history of these tribes shows that this protection was their chief concern. They had been driven from their homes in the east and had sought a quiet haven from the white intruders in the country west of the Mjssissippi, and these promises of protection induced them to remove. In their treaty of August 7, 1856, 11 Stat. 699, the United States agreed to remove all trespassers from their domain, and to use the military forces for this purpose, if necessary. When the Civil War began the military protection was withdrawn from the Indian territory and their homes were overrun. They found themselves involved in a war which they had no part in creating (1862 Rept. Comr. Ind. Aff., pp. 142-143; Ibid., 1863, p. 185). The United States Agent for the Seminoles, in reviewing this period stated in part as follows (1869 Rept. Comr. Ind. Aff., pp. 417, 418):

> * * * They were driven from their homes, their property destroyed, their houses burned, and their stock driven off without compensation to their lawful owners. * * * Opothleyohola, with a band of loyal Creeks and Seminoles, in midwinter started with their

women and children for Kansas, a distance of more than three hundred miles. Without adequate food and clothing they traveled on their weary march. They were pursued by men of their own race, and the bloody battles of Cedar and Bird Creeks attest the courage and patriotism of that good old man and his faithful followers. Freezing, starving and dying, they at length reached Kansas, and their able-bodied men immediately enlisted in the service of the government; and the history of the three Indian regiments present as honorable record as any of all the noble army that served the nation. When the war ended they were destitute and scattered from the Red River to Kansas. Again they sought the protection of the government. They formed new treaties; they complied with all the conditions imposed upon them; * * * They took hold of the question of reconstruction and settled it at once, practically, peaceably, and firmly. They have reopened their schools and churches; have re-built their homes, and are fast becoming surrounded by stock, farms, and all the comforts of life. With such a record should not the government repay them for their losses, faithfully and promptly carry out all their treaty stipulations, repel the encroachments of white men, and pay them for their lands, and see that justice is done them in all their intercourse with white men?"

As a part of the consideration of the new treaties of 1866 the United States again promised them protection. In the instructions of James Harlan, Secretary of the Interior to the United States Treaty Commissioners, dated August 16, 1865, it is stated (American Indian under Reconstruction by Annie Heloise Abel, Slave Holding Indians, Lib. Cong. No. E 540.I3A22, p. 223):

"To secure to the tribes the absolute and undisturbed possession of the Indian Territory, a clause should be inserted in the treaty, prohibiting any white person, except officers, agents and employees of the government, from going to or settling in said territory; unless formally admitted and incorporated into some one of the tribes lawfully residing there, according to its laws and usages."

The former promises of the United States to remove all white intruders and trespassers, made in the 1856 treaty (Art. 15, 11 Stat. 699), were reaffirmed and carried forward in the treaties of 1866 (Art. 9, 14 Stat. 755; Art. 12, 14 Stat. 785); and as a further protection the United States solemnly agreed to guarantee them quiet possession of their country. This was a promise looking to the future. Did this guarantee mean anything?

The majority opinion further states (Op. p. 4):

> "This conclusion does not mean that the United States in signing the treaty made an empty promise. * * The guarantee of quiet possession called for a series of legislative, administrative and military judgments, but was not a pledge of monetary reparation."

The court further emphasized the fact that this action was brought against the Government and not against the railroads which have committed the asserted misdeeds (Op. p. 2). This guarantee of quiet possession, and the promise to remove intruders and trespassers were not made by the railroad companies to the petitioners, but were made by the United States directly to these Indian wards. Therefore, suit on this phase of the case could not have been brought against the railroads, but solely against the United States.

These tribes had made no arrangements directly with the railroads, but all of the arrangements with the railroads were made by the United States. The treaties of 1866 granted rights of way to two railroads only, which, when duly authorized by Congress, and with the express consent and approbation of the Secretary of the Interior, shall undertake to construct a railroad through the domains of these tribes. The color of right of the railroads therefore did not spring from an arrangement made with the tribes directly, but was acquired through arrangements made directly with the United States.

If the guarantee of quiet possession, and the promise to remove intruders meant nothing but legislative, adminis-

trative and military judgments, which failed to give the tribes the quiet possession so solemnly promised, and the tribes suffered loss as a result of this failure, would not a construction that no monetary recovery may be had thereunder result in making the guarantee of quiet possession nothing but "sounding brass, or a tinkling cymbal"?

Should this great nation of ours be excused from liability for a loss caused by the violation of its treaty obligations, for the reason that the promises made by treaty were difficult of execution?

We respectfully submit that for the failure to afford the protection guaranteed by solemn treaty obligation—the one important factor which induced the Indians to treat with the United States—the law imposes an obligation on the party causing the loss to make money reparation, and that such reparation is not contingent upon the promise of the wrongdoer to be liable in case it violated its solemn treaty obligation.

2.

The majority opinion states in part as follows (Op. p. 8):

> "That the government did not mean to assume an insurer's responsibility for the payment of sums claimed by the Indians against the railroads is further shown by the fact that the Indians retained their own independent remedy for wrongs done them. The tribes have not yet been dissolved, and they have had, both as a general legal right and by virtue of the very section of the 1906 Act under discussion here, the power to bring actions on their own behalf. That the United States also had a right to sue did not necessarily preclude the tribes from bringing their own actions."

Since the Court's opinion we have again carefully reviewed the cases cited by the Court in support of its holding that the tribes had a general legal right to sue on their own behalf.

Cherokee Nation v. *Hitchcock*, 187 U. S. 294, was a suit brought to test the constitutionality of the Curtis Act, and involved the power of the Secretary of the Interior to lease tribal lands under this act. The case was brought by vari-

ous parties plaintiff, and the Cherokee Nation was joined as a party plaintiff. The right of the tribe to sue was not questioned, and the court did not pass upon this question.

Lone Wolf v. Hitchcock, 187 U. S. 553, was a class suit in which the question of the right of the tribe to sue was not raised and therefore was not passed upon. The question in this suit was whether a subsequent act of Congress could vary the terms of a prior Indian treaty.

Lane v. Pueblo of Santa Rosa, 249 U. S. 110, and *United States v. Candelaria*, 271 U. S. 432, were cases authorized by the territorial laws of New Mexico, which gave the Pueblos the right to sue, and these territorial laws were sanctioned by act of Congress. Therefore, the right of these tribes here to sue rested on statutory authority.

We submit that none of these cases held that an Indian tribe had a general legal right to sue to protect its own interests in the absence of any enactment of Congress giving it that right.

The Constitution of the United States (Art. 1, Sec. 8) gave Congress the power to regulate commerce with foreign nations and with the Indian tribes. These Indian tribes being under the control of Congress, would have only such rights and privileges that were conferred upon them by Act of Congress or by treaty. In our supplemental memorandum we reviewed the treaties and acts of Congress, and were unable to find where these tribes had ever been given the general legal right to sue to protect their own property interests.

The Act of February 28, 1902.

Clearly the Act of February 28, 1902, c. 134, 32 Stat. 43, did not give the tribes any such right. Section 15 provided for an appeal to the courts in cases of disputes over the amount of damages to be paid for lands taken for railroad purposes. Section 16 provided that the railroads pay to the Secretary of the Interior for the benefit of the tribes $15.00 per mile per annum for each mile of road con-

structed, as compensation for the right of user. The court refers to an opinion of the Secretary of the Interior with respect to this annual charge (footnote 5, p. 2). As the cases are before the Court on demurrer petitioners have not presented their views with respect to the correctness of this opinion.

The Act of 1902 was an arrangement made by the United States directly with the railroads. Although this act disposed of lands of these Indian tribes, yet their rights and wishes were not consulted. However, Congress provided certain benefits for the tribes whose lands were affected. Certainly the guardian, who alone made the arrangements with the railroad companies, would be the proper party to enforce these benefits for its Indian wards. Especially would this be true when the United States had assumed full administrative control over all of the property and affairs of these tribes under the provisions of the Curtis Act, approved June 28, 1898, c. 517, 30 Stat. 495, and under the subsequent agreements made with these tribes (*Cherokee Nation* v. *Hitchcock*, 187 U. S. 294).

At this time these were an unlettered people, with few enlightened men among them. Even today these Indians find the ways of white men difficult to comprehend. Is it to be presumed that these dependent people with their limited understanding would have the ability to enforce laws of which they knew nothing and had no part in creating?

Had the tribes sued the railroad companies for the $15.00 per mile charge under Section 16 of the Act of 1902, the railroads would have defended on the ground that the Act provided that the Secretary of the Interior receive this money, and that under the statute the Indian tribes were not the proper parties to enforce this provision and collect this money.

The Act of April 26, 1906.

We have again reviewed the provisions of the Act of April 26, 1906, c. 1876, 34 Stat. 137, and are unable to find where the Indian tribes have been given the authority to sue generally to protect their own interests. In fact, the whole import of the act gives the Secretary of the Interior the right to do so. Section 11 states that the Secretary *shall* collect all revenues due these tribes, and Section 18 authorized him to bring suit to enforce these collections. Section 18 did not modify the powers granted the Secretary by Section 11, but merely provided the means by which the Secretary could enforce the duty imposed upon him by Section 11. As pointed out in our supplemental memorandum (pp. 12-13), in a few instances the tribes were given the right to proceed in the courts on their own behalf, chiefly in matters affecting enrollment, and under Section 18 pending cases were permitted to proceed to final disposition. We were unable to find where Section 18 grants these tribes any right to sue generally in the court to protect their own interests.

We submit that had the tribes sued the railroad companies they would again have been met by the defense that the Secretary of the Interior alone was given the right to collect these amounts under the Act of 1906, and that these tribes had no such power.

Even though it be held that these Indian tribes had been given the general right to sue in the courts of the United States to protect their own interests, were these wards of our Government expected to assume that burden? Mr. Justice Vandevanter, an outstanding authority on Indian law, who perhaps decided more cases involving the affairs of these tribes than any other Judge, having as a background the knowledge of all laws affecting these tribes, wrote the opinion of this Court in *The United States* v. *The Creek Nation*, 295 U. S. 103, in which this court stated (p. 110):

> "True, the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the dis-

posals; but it was not in a position where it could be expected to assume that burden. It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests. Plainly the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose. * * *".

We submit that the above statement, and the dissenting opinion herein, follow the long line of decisions of this Court reflecting the broad view that the United States owes to its dependent Indian wards the duty of protection, and that these tribes, even if free to act on their own behalf, could not be expected to assume that burden.

The Court predicates its conclusions with respect to the claims under the Acts of 1902 and 1906 upon its failure to find that the Government assumed the contractual obligations of an insurer or guarantor of the collection of the money due these tribes from the railroad companies (Op. pp. 5, 7).

The petitioners' contentions were based upon the failure of the Government, as guardian, to protect properly the wards' property interests. When it acted independently with respect to the property of these tribes, made arrangements with railroad companies to use their lands, and provided benefits for them, we submit that it was in duty bound to collect these benefits for its Indian wards.

The petitions alleged, and the demurrer admits, that the United States failed, neglected, and refused to collect the amounts due petitioners from the railroad companies. All matters of defense, such as those mentioned by the Court on page 8 of the opinion, would not be under consideration on demurrer.

Certainly liability for the violation of a duty owed by the guardian to the estate of its ward, arises by virtue of the well settled principles of equity, which govern the duties of the guardian of its dependent Indian wards.

We submit that the United States is required to show that it acted with reasonable diligence in managing the trust estate. Herein no such showing is made.

In Bogert, Trusts & Trustees, Vol. 3, Sec. 592, pp. 1867-1868, it is stated:

> "As a portion of the process of assuming control of the trust property, the trustee has the duty of collecting choses in action which are a part of the trust estate. If he finds among the assets of the trust notes, bonds, mortgages, checks, drafts, judgments, or other contract or tort claims, he should proceed with reasonable diligence to collect as much money as possible from the obligors. For a failure to act toward this end with reasonable skill and celerity, the trustee will be liable. * * *" (Cases cited.)

We respectfully submit that the petitions state equitable claims against the United States within the meaning of the jurisdictional acts of 1924 and 1937.

CONCLUSION.

Because of the broad general views heretofore taken by this Court in many of its prior decisions involving the duties of the United States to its dependent Indian wards, we felt justified in submitting these matters for the further consideration of the Court.

We certify that this petition is submitted in good faith, and not for delay.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 321, 322.—October Term, 1942.

321	The Creek Nation, Petitioner, vs. The United States.	On Writ of Certiorari to the Court of Claims.
322	The Seminole Nation, Petitioner, vs. The United States.	

[April 5, 1943.]

Mr. Justice Black delivered the opinion of the Court.

These actions were originally brought in 1926 under special jurisdictional acts of 1924, which gave the Court of Claims jurisdiction over claims under "any treaty or agreement between the United States" and these tribes.[1] The actions were based on a contention that the United States had breached its obligation as a guardian of its Indian wards in failing to collect the sums described below. The Court of Claims sustained a demurrer to the first complaint on the ground that the special jurisdictional acts permitted actions brought on specific statutory or treaty pledges only, and not actions brought on a wardship theory. 75 Ct. Cls. 873. The petitioners subsequently amended their complaints to comply with the requirements of the jurisdictional acts, alleging that the United States in specific statutes and treaties guaranteed to repay the Indians for the losses claimed to have been suffered. The Court of Claims sustained a demurrer to the second amended complaint on the ground that it did not state a cause of action, — Ct. Cls —, and we granted certiorari because of the importance of the questions raised in the administration of Indian affairs. The cases present the question whether the United States has assumed treaty or statutory obligations which require it to indemnify the Creek and Seminole nations for injuries alleged to have been suffered by them as a result of the seizure and use of their land by private railroad companies.

[1] 43 Stat. 133, 43 Stat. 139. See also the jurisdictional act of 1937, 50 Stat. 650.

By the treaties of 1866,[2] the Creeks and Seminoles granted a right of way to railroads which the United States might later authorize to construct and operate routes across their lands. They agreed to permit the railroads to buy strips up to three miles in width on each side of the track. In the succeeding thirty-six years, Congress, by a series of special acts, authorized the construction and operation of railroads,[3] and in 1902 it passed a general statute concerning future railroad construction in the Indian territory.[4] The 1902 Act included a provision, § 16, that railroads should pay a fixed annual sum per mile to the Secretary of the Interior for the benefit of the tribes.

The Indians allege that the railroads have not complied with the terms of the treaties and statutes in that they have taken and held certain station reservations unnecessary for railroad purposes for their own benefit, that they have received rents and profits from the use of these lands, and that they have failed to pay the annual mileage charge.[5] They ask that the government indemnify them for the value of the lands allegedly wrongfully taken, for rents and profits accruing to the railroads from their use of those lands, and for the mileage charge.

It must be emphasized that this action is brought, not against the railroads which have committed the asserted misdeeds, but against the government for its failure to collect the sums claimed for the petitioners from the railroads. The question for decision here, therefore, is whether, assuming arguendo that the railroads

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[2] 14 Stat. 755. (Seminole), 785 (Creeks). The treaties are sufficiently similar so that hereafter reference will be made to the Creek treaty only.

[3] The treaty was originally interpreted as permitting the construction of only two railroads through the territory. Letter of the Secretary of the Interior to the President, May 21, 1870, approved by him May 23, 1870, referred to at 13 O. A. G. 285 (1870). In the 1880's Congress began, in a series of special acts, to authorize construction of railroads through the Indian Territory on a theory of eminent domain. Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641. See e. g. the Committee Report and discussion of the bill granting a right of way to the Gulf, Colorado, and Santa Fe Railway, 15 Cong. Rec. 4711 *et seq.* (1884). Approximately one half of the railroads involved in the instant case appear to have been authorized by special acts and to have been constructed prior to the general act of 1902. For a general history of railroads in Oklahoma see Bulletin No. 60, The Railway and Locomotive Historical Society, "The Railroads of Oklahoma", published through the Baker Library of the Harvard Business School (1943).

[4] An Act regulating general construction of railroads through Indian lands was first adopted in 1899, 30 Stat. 990. The 1902 Act was more particularly directed at construction through the territory of the Five Civilized Tribes, of which petitioners are two.

[5] Under an opinion of the Secretary of the Interior the obligation to make this payment terminated upon the admission of Oklahoma as a state in 1907, 38 Decisions of Secretary of the Interior (Public Lands) 414.

are at fault, the government was obligated to compel restitution or to recover damages; and if the government failed to do these things, whether it had a duty to make the Indians whole. We are asked to find an agreement to indemnify the tribes for these losses in the Treaty of 1866, the Act of 1902, and an Act of 1906.

First. The Treaty of 1866. Article I of the Treaty provided:

"[The Creeks] also agree to remain at peace with all other Indian tribes; and, in return, *the United States guarantees them quiet possession of their country*, and protection against hostilities on the part of other tribes. In the event of hostilities, the United States agree that the tribe commencing and prosecuting the same, shall, as far as may be practicable, make just reparation therefor." (Emphasis added.)

The petitioners contend that the government failed to prevent the railroads from taking and holding station reservations later found to be unnecessary for railroad purposes, and that it thus became liable to the petitioners for breach of the guarantee of "quiet possession".

The Court of Claims concluded that the guarantee of quiet possession applied only to protection from hostilities by other tribes. Such a conclusion receives support from a consideration of the circumstances of the time, for inter-tribal warfare was a dominant danger. Some of the tribes had fought on each side in the Civil War, and strange new tribes were about to be settled on adjacent land. The turmoil of reconstruction called for military protection.

We conclude that, whether or not the guarantee is limited to military protection, this language did not obligate the United States to compensate the tribes for encroachments by railroads acting under color of right. Keeping the peace and protecting the Indians was a difficult, and at times almost impossible, task,[6] and we cannot assume that the government meant to guarantee reparations for breach of quiet possession without a single explicit word in the Treaty to that effect. Where reparations were planned,

[6] "The treaties of 1866, and other treaties also, guarantee to the five civilized tribes the possession of their lands; but, without the moral and physical power which is represented by the Army of the United States, what are these treaties worth as a protection against the rapacious greed of the homeless people of the States who seek homesteads within the borders of the Indian Territory? If the protecting power of this Government were withdrawn for thirty days, where would the treaties be, and the laws of the Indians and the Indians themselves?" Report of the Commissioner of Indian Affairs in 1 Report, Secretary of the Interior (1886), 81.

clear language was used. Thus in the section quoted above hostile tribes, and not the government, were explicitly made liable for the tribe's depredations. There is no such provision putting a similar liability for losses of any sort on the United States.[7] A promise by the government to try to keep the peace is not equivalent to a promise to make payments if the peace is not kept; "and before any judgment should be rendered binding the United States it is familiar and settled law that the statute claimed to justify such judgment should be clear and not open to debate." *Leighton* v. *United States*, 161 U. S. 291, 296, 297.

This conclusion does not mean that the United States in signing the treaty made an empty promise. The government undertook to use its military power to protect the Indians against military aggression, and in addition it undertook through its administrative and legislative policy to aid the tribes to hold possession of their lands. In view of the pressures of the time, it appears to have treated its obligation with real care. The acts providing for the construction of the railroads, for example, provided for payment to the Indians for the land taken,[8] attempted to restrict the amount granted to that necessary,[9] and usually provided for reversion of title to the Indians upon discontinuance of the road.[10]

[7] The only instance which has been called to our attention in which the United States specifically guaranteed to bring civil actions for the benefit of a tribe and insured payment for trespasses is the treaty of May 24, 1834, with the Chickasaws, 7 Stat. 450.

[8] The Act of July 27, 1866, 14 Stat. 292, § 7, authorizing the construction of a railroad through the Indian country provided for a jury trial to determine the fair price. See, for example of the liberal construction given a similar provision in 23 Stat. 73, Cherokee Nation v. Southern Kansas Ry., 135 U. S. 641, 651-653. Another act passed in 1866, 14 Stat. 289, § 8, provided that the railroad should be constructed "with the consent of the Indians, and not otherwise."

[9] Note, for example, in the Congressional discussion of the bill authorizing construction of the Gulf, Colorado and Santa Fe Railway, an Oklahoma railroad not directly involved here, the debate over the amount of land necessary for sidings. 15 Cong. Rec. 4715-4718 (1884).

[10] The experience of one of the first of the two roads authorized under the treaty is revealing of the manner in which the use of the Indian lands was supervised: The Atlantic and Pacific Railroad was authorized to build a line by an 1866 act, 14 Stat. 292. In 1871, after small parts of the line had been completed, it was ordered to cease work by the Secretary of the Interior and was not allowed to continue until it had posted a bond for the protection of Indian interests. See discussion at Atlantic and Pacific R. R. v. Mingus, 165 U. S. 413, 417. Failure to complete the road resulted in an 1886 Act taking the lands previously granted back into the public domain, 24 Stat. 123, and the road was ultimately completed by the St. Louis and Oklahoma City Ry. Co. under an 1896 special act, 29 Stat. 69. Section 2 of that Act provides for reversion to the tribes of lands not used for railroad purposes.

In 1871, upon appeal of the tribes, the Secretary of the Interior refused to permit a road to enter the territory because of a claimed violation of the treaty.[11] The guarantee of quiet possession called for a series of legislative, administrative, and military judgments, but was not a pledge of monetary reparation.

Second. The Act of February 28, 1902. The petitioners rest on §§ 15 and 16 of the Act of 1902. Section 15 provides that the tribes through whose land the roads were to be built should be compensated by the railroads for the land taken. The section established a system of valuation under judicial supervision and with a right of appellate review. These elaborate provisions provide an adequate method by which the tribes might protect their own interests, but contain no indication of any kind that the government should pay for the lands taken.[12]

Section 16 provides that "where a railroad is constructed under the provisions of this Act there shall be paid by the railroad company to the Secretary of the Interior, for the benefit of the particular tribe or nation through whose lands any such railroad may be constructed, an annual charge of fifteen dollars per mile. . . ." Petitioner contends that this direction to the Secretary to accept these payments made the government an insurer of their collection.

Variants of this statutory phase were used generally in acts authorizing railroad construction after 1884. The Act of 1902, as has been noted, was the successor to the general railroad authorization act of 1899, which in 30 Stat. 990, § 5, required "such an annual charge as may be prescribed by the Secretary of the Interior, not less than $15.00 for each mile." Other acts of the period varied in that the Secretary was directed to apportion the sum collected among several tribes according to their interests.[13] Some of the earlier acts mentioned no specific sum, giving the Secretary complete discretion as to the amount to be collected and the method of allocating it.[14] This device of assessment of an

[11] Lotter, Secretary of the Interior, May 21, 1870, *supra*, note 3.

[12] Whether added obligations in connection with this section were assumed by the United States in the 1906 Act is considered below.

[13] See, e. g., the act authorizing construction of the Kansas and Arkansas Valley Railroad, 24 Stat. 73, § 5 (1886), or the act authorizing construction of a branch of the St. Louis and San Francisco Railroad, 29 Stat. 80, § 5 (1896).

[14] The act authorizing construction of a railroad through the Papago (Arizona) reservation provided: "Such compensation as may be fixed by the Secretary of the Interior be paid to him by the said railroad company, to be expended by him for the benefit of the said Indians." 22 Stat. 299 (1882).

annual charge payable to the Secretary was also used in authorizing construction of telephone and telegraph lines across Indian lands, 25 U. S. C. § 319.

By the time of the adoption of the 1902 Act, the verbal formula used in § 16 was so familiar that it required no discussion in Congress. The clause seems first to have been used in an act of 1884, 23 Stat. 69, § 5, authorizing the Gulf, Colorado, and Santa Fe Railway to cross the Indian territory. The $15.00 charge was considered a tax, approximately equal to the taxes charged by neighboring states.[15] No word was said indicating that the United States, acting as a voluntary tax collector for the tribes, meant to guarantee to the tribes that the taxpayers would make their payments when due.

Considering § 16 in its relation to the other statutes of the period, many of which through minor variations gave wide discretion to the Secretary of the Interior, we conclude that the words of this section were a direction to the Secretary to make the facilities of his office available for the payment of a form of tax. It provides that the railroads shall pay the tax to the Secretary, but puts no mandatory duty on the Secretary to do the work of collecting. We cannot suppose from any evidence before us either of legislative history or administrative practice that the United States repeatedly assumed obligations to indemnify the Indian tribes for charges which railroad companies, telephone companies, and telegraph companies constructing lines across Indian lands may have failed to pay. Cf. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421.

Third. The Act of 1906. Congress at one time planned to terminate the existence of the Five Civilized Tribes in 1906, and the Act of 1906 was introduced into the House of Representatives with the object of preserving Indian interests after tribal dissolution. In the course of discussion, Congress determined to continue the tribal existence, and the Act was amended to that effect before passage. The petitioners' final reliance is on sections 11 and 18 of this Act.

The relevant portion of Section 11 of the Act is as follows:

> "All revenues of whatever character accruing to the Creek and Seminole tribes, whether before or after dissolu-

[15] See discussion in the House of Representatives, 15 Cong. Rec. 4723-4727. For an analysis of the nature of this tax see the Opinion of the Secretary of the Interior, *supra*, note 5.

tion of the tribal governments, shall . . . . be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him."

The petitioner contends that under this section the government is liable for rents and profits on the station reservations allegedly wrongfully taken and wrongfully used by the railroads.

This language, like that of § 16 of the 1902 Act which it so closely resembles, does not make the government a guarantor that sums owing will be paid. The claim asserted is in essence one of damages for trespass, and assuming that the proceeds of a trespass action are to be considered "revenue", the Secretary was surely entitled to discretion as to which trespass actions he might consider worth bringing. In so far as the petitioner contends that the railroads wrongfully took lands under pretense of right in their original grants under the statutes, the administrative machinery provided by the acts gave the tribes adequate redress through the courts at the time the land was taken.[16] As to trespasses which may have been committed by the railroads without compliance with the forms of the authorizing Acts, or as to holdings, once proper, which the railroads may have retained after the rights to them had expired, we find no absolute duty on the Secretary to obtain compensation.

That the Secretary's duty to collect revenues and institute actions under the Act was discretionary is made clear by § 18:

"The Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the . . . . Creek, or Seminole tribes, respectively . . . . for the collection of any moneys or recovery of any land claimed by any of said tribes. . . . ."

The petitioners contend that under this section the Secretary was obligated to bring suit for all damages suffered by the tribes for failure to pay sums owing under §§ 15 and 16 of the 1902 Act, for trespass and mileage taxes, for any breach of the treaty, and for rents and profits collected by the railroads. But the use of the word "authorized" in this context necessarily reserved to the Secretary the right to determine his own course of action. It must be remembered that the Secretary was traditionally given wide discretion in the handling of Indian affairs[17] and that discretion would seldom be more necessary than in determining

[16] See for example § 15 of the 1902 Act.

[17] Cohen, Handbook of Federal Indian Law, "The Range of Administrative Powers", 100 *et seq.*

when to institute legal proceedings. For example, a railroad might have become bankrupt or reorganized before a failure to make proper payments was discovered,[18] making recovery impossible; and we can not suppose that the Secretary might not compromise difficult cases without bringing suit.

That the government did not mean to assume an insurer's responsibility for the payment of sums claimed by the Indians against the railroads is further shewn by the fact that the Indians retained their own independent remedy for wrongs done them. The tribes have not yet been dissolved, and they have had, both as a general legal right[19] and by virtue of the very section of the 1906 Act under discussion here, the power to bring actions on their own behalf. That the United States also had a right to sue did not necessarily preclude the tribes from bringing their own actions.[20]

We are asked here to impose a liability on the government to these Indians for wrongs allegedly committed against the Indians by others. Appreciating the desire of Congress to recognize the "full obligation of this nation to protect the interests of a dependent people," *Tulee* v. *Washington*, 315 U. S. 681, 685, we are unable to find in the words of the treaties or statutes upon which this action rests any such prodigal assumption by the government of other people's liabilities as that for which the petitioners contend here.

Affirmed.

MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case.

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[18] The Oklahoma properties of the St. Louis and San Francisco Railway Co. were held by 25 different corporations between 1866 and 1916. The Atchison, Topeka, and Santa Fe, not directly involved in this action, is the descendant of 64 railroads with Oklahoma holdings. Approximately 150 railroads have existed in Oklahoma. See "The Railroads of Oklahoma", *supra*, note 3, pp. 28-77.

[19] Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641; Cherokee Nation v. Hitchcock, 187 U. S. 294; Lone Wolf v. Hitchcock, 187 U. S. 553. Cf. Lane v. Pueblo of Santa Rosa, 249 U. S. 110 and United States v. Candelaria, 271 U. S. 432.

[20] Cf. Heckman v. United States, 224 U. S. 413, 446; United States v. Osage County, 251 U. S. 128; Sunderland v. United States, 266 U. S. 226.

SUPREME COURT OF THE UNITED STATES.

Nos. 321 and 322.—October Term, 1942.

321	The Creek Nation, Petitioner, *vs.* The United States.	On Writs of Certiorari to the Court of Claims.
322	The Seminole Nation, Petitioner, *vs.* The United States.	

[April 5, 1943.]

Mr. Justice Murphy, dissenting.

As a people our dealings with the Indian tribes have been too often marked by injustice, neglect and even ruthless disregard of their interests and necessities. As a nation we have incurred moral and political responsibilities toward them and their descendants which have been requited in some measure by treaties and statutes framed for the protection and advancement of their interests. Those enactments should always be read in the light of this high and noble purpose, in a manner that will give full scope and effect to the humane and liberal policy that has been adopted by the Congress to rectify past wrongs.[1]

Each railway company whose road was constructed under the Act of 1902[2] was required by § 16 of that Act to pay to the Secretary of the Interior, for the benefit of the particular tribe through whose lands the road passed, an annual charge of fifteen dollars for each mile of road constructed. By the Act of 1906 it was provided that all revenues accruing to the Five Civilized Tribes "shall . . . be collected by an officer appointed by the Secretary of the Interior", and the Secretary was authorized to bring suit in the name of the United States for the use of any one of the five tribes to collect any moneys claimed by it.[3] For failure of the Secretary of the Interior to collect these mileage charges

[1] Choctaw Nation v. United States, 119 U. S. 1, 27-28; Seminole Nation v. United States, 316 U. S. 286, 296-97.

[2] Act of February 28, 1902, 32 Stat. 43.

[3] §§ 11 and 18 of the Act of April 26, 1906, 34 Stat. 137, 141, 144.

for the Creek and Seminole tribes, among other things, this action is brought under jurisdictional acts[4] which authorize the Court of Claims to hear and determine all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and those tribes, or out of any act of Congress relating to Indian affairs.

We have held that the Government in its relations with the Indian tribes occupies the position of a fiduciary, that the relationship is similar to that of guardian and ward, and that the duties and responsibilities of the United States toward its wards require a generous interpretation.[5] If it is the duty of a guardian or trustee, as I conceive it to be, to exercise diligence to conserve and protect the interests of his trust, and collect moneys due to the estate of his ward, then such a duty may well have arisen under § 16 of the Act of 1902, a duty which, it is alleged, the Secretary of the Interior failed to discharge. In other words, if the railroads failed to pay to the Secretary the required annual charges for each mile of road constructed, it was the Secretary's duty to act to protect the Indian beneficiaries who should not be expected to assume the burden of acting on their own behalf, especially when the payments were to be made to the Secretary and not to them. Cf. *United States v. Creek Nation*, 295 U. S. 103, 110. To read the Act of 1902 otherwise is to take too restricted a view of the obligations of the United States toward a dependent people. But if there were any doubt, the duty of the Secretary of the Interior to collect the mileage charges was made plain and unmistakable by the Act of 1906 which required him to collect all revenues accruing to the tribes and specifically authorized him to bring suit on their behalf. The present claim to mileage charges undoubtedly is an equitable one arising out of those statutes and is therefore within the scope and purpose of the jurisdictional acts.

In my opinion the petitioners state a cause of action with respect to these mileage claims and the judgment of the Court of Claims should accordingly be reversed.

Mr. Justice FRANKFURTER agrees with these views.

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[4] Act of May 20, 1924, 43 Stat. 133 (Seminole), and Act of May 24, 1924, 43 Stat. 139 (Creek).

[5] See Note 1, *ante*.